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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

THE YANKTON SIOUX TRIBE,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioner, the Yankton Sioux Tribe of Indians, respectfully petitions the Court to issue a writ of certiorari to review the decision of the Court of Claims affirming the decision of the Indian Claims Commission that the Yankton Sioux Tribe has only a seven percent interest in the Sioux Fort Laramie lands.

OPINION BELOW

On February 20, 1980, the Court of Claims affirmed the decision of the Indian Claims Commission that

the Yankton Sioux Tribe had a seven percent interest in the Sioux Fort Laramie lands. The Court of Claims opinion, not yet reported, is Appendix A to this petition.[1] Other relevant previous decisions in this case are:

Decision of Indian Claims Commission, 41 Ind. Cl. Comm. 16 (Dec. 1977), relevant portion reprinted at Appendix B.

Decision of Indian Claims Commission, 40 Ind. Cl. Comm. 454 (Aug. 1977), relevant portion reprinted at Appendix C.

Decision of Court of Claims, 205 Ct. Cl. 148, 500 F.2d 458 (1974), relevant portion reprinted at Appendix D.

Decision of the Indian Claims Commission, Ind. Cl. Comm. (1970), relevant portion reprinted at Appendix E.

JURISDICTION

The Yankton Sioux Tribe's motion for rehearing of the decision issued by the Court of Claims sought to be reviewed was denied on March 28, 1980, Appendix F, and this petition was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

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[1] In the court below the appeal by the Yankton (Appeal No. 6-78), involving a dispute between the Yankton Sioux and the Teton Sioux, was consolidated with an appeal by the United States (Appeal No. 4-78), involving a dispute between the United States and the Teton Sioux. The 4-78 appeal is irrelevant to this petition for certiorari.

QUESTIONS PRESENTED

Whether this Court in the exercise of its supervisory power over lower courts should countenance the total abdication by the Court of Claims of its statutory duty to review the findings and conclusions of the Indian Claims Commission, thus affirming an egregious miscarriage of justice perpetrated by the Indian Claims Commission.

AUTHORITIES INVOLVED

The Indian Claims Commission Act, § 20(b), 60 Stat. 1049 (1946), 25 U.S.C. § 70s(b), reprinted as Appendix G.

STATEMENT OF THE CASE

This case centers on a lengthy dispute between two subdivisions of the Sioux Indians (the Yanktons and the Tetons[2]) concerning the proper division between them of their joint interest in the territory known as the Sioux Fort Laramie land. The Yanktons were originally awarded a 17% interest, but the Commission unjusti-

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[2] In aboriginal times, there were three major divisions of the Sioux—the *Eastern or Mississippi Sioux* (subdivided into four groups: the Wahpekute, Sisseton, Mdewkanton, and Wahpeton; the *Middle Sioux* (the Yankton and Yanktonai); and the *Western or Teton Sioux*. The Tetons consisted of seven bands: Brule, Oglala, Minneconjou, Two Kettle, Hunkpapa, Sans Arc and Blackfeet Sioux. The Yankton Sioux Tribe is the plaintiff in Indian Claims Commission Docket 332-C. The plaintiffs in Indian Claims Commission Docket 74 consist mainly of the descendants of the Tetons and the Yanktonais, Appendix D, 205 Ct. Cl. at 156. Although the Docket 74 plaintiffs have often been referred to as the "Sioux Tribe", the "Sioux Nation" or the "Docket 74 Sioux", we shall refer to them herein as the "Tetons" because the Yanktonais were ruled to have no interest in this case. *Id.*

fiably changed its mind and reduced it to 7%. The Court of Claims affirmed. This petition followed.

In 1970 the Indian Claims Commission held that the Yanktons and the Tetons had joint title to the Sioux Fort Laramie lands,[3] recognized by the United States by virtue of the execution by the Indian chiefs of the Treaty of Fort Laramie, 11 Stat. 749 (1851), 2 Kapp. 459. Following its usual rule that when more than one Indian tribe holds recognized title to a tract of land its interest is a function of its total population at the time of the treaty recognizing the title,[4] the Commission held that the Yanktons had a 17% and the Tetons an 83% interest in the Sioux Fort Laramie lands. Appendix E, 24 Ind. Cl. Comm. at 157-158.

The Tetons appealed. The Court of Claims affirmed the decision that the Yanktons and the Tetons had joint title to the Sioux Fort Laramie lands, recognized by the United States, but reversed the Commission's determination that the apportionment between them should be on the basis of their total population in 1851, the year of the Treaty. Appendix D, 205 Ct. Cl. 170. On the ground that such an apportionment might be overly generous because of the possibility that not all the Yanktons used the Sioux Fort Laramie lands, the court directed the Commission, upon remand, to predicate the apportionment, if possible, upon the

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[3]The boundaries of the Sioux Fort Laramie lands are described at *Sioux Tribe v. United States*, 15 Ind. Cl. Comm. 577, 597-598 (1968). They contain 60,308,000 acres west of the Missouri River in what are now the states of North and South Dakota, Nebraska, Wyoming and Montana. 205 Ct. Cl. at 155.

[4]This rule is called the *Blackfeet* rule after the case of *Blackfeet & Gros Ventre Tribes v. United States*, 18 Ind. Cl. Comm. 289, 321 (1967). *See* Appendix D, 205 Ct. Cl. at 167.

number of Tetons and Yanktons actually using the Fort Laramie lands. *Id.* at 167. If competent evidence did not appear upon which to predicate such an apportionment, however, the court held that the initial apportionment based on total population (*i.e.*, 17%-83%) should be reinstated. *Id.* at 170.

Upon remand, the Indian Claims Commission held a full evidentiary trial in January, 1976, and both sides put on evidence relevant to the actual population use test spelled out by the Court of Claims in its 1974 opinion.

On August 25, 1977, the Commission rendered its decision. The relevant part of the Commission's analysis appears in eight pages, Appendix C, 40 Ind. Cl. Comm. 468-476. The first six of the eight pages, 468-473, are devoted to a detailed recitation of reasons why the evidence was too fragmentary and nonspecific to permit any quantification.

From this recitation the Commission concluded that:

> ". . . the evidence does not disclose the proportion of Yanktons using the subject area." p. 473.
>
> "Clearly, from the evidence we cannot determine whether all or simply a portion of the Yanktons or Tetons were involved in the use and occupancy activities." p. 474.
>
> "The evidence is insufficient for us to determine how many Yanktons, used and occupied lands within the Sioux-Fort Laramie area." p. 475.

Accordingly, following the 1974 directions of the Court of Claims that if the evidence did not disclose the numbers of Yanktons and of Tetons using the Sioux Fort Laramie lands, the original apportionment based on total population would be reinstated, the Commission reinstated its 1970 apportionment based on total relative

populations, *i.e.*, 17% for the Yanktons and 83% for the Tetons.

The Tetons moved for rehearing of this decision and, on December 27, 1977, the Commission granted the motion and revised its August decision. In its revised opinion the Commission declared that in August it had read the Court of Claims' 1974 remand order too narrowly, and stated that a "careful rereading" of the Court of Claims' 1974 decision convinced it that a determination of the comparative populations of the two groups using the land was possible after all. Without making any findings of fact in addition to the ones it had made to accompany its August 25, 1977, decision, and without any new evidence before it, the same Commission which four months previously had stated that it could not determine whether all or simply a portion of the Yanktons or Tetons used the Sioux Fort Laramie lands, concluded, astonishingly, that "around the time of the Fort Laramie Treaty of 1851 approximately two-thirds of the Brules, 30% of the Oglalas, 75% of the Minneconjous, 90% of the Two Kettle, Hunkpapa, Sans Arcs, and Blackfeet Sioux, and 25% of the Yanktons used and occupied the Sioux-Fort Laramie lands." Appendix B, 41 Ind. Cl. Comm. at 165.

It did not cite any evidence whatsoever to support these conclusions, and there was none. These were figures conjured from the air. Nor did they represent a fair inference from the evidence, for there was not even a suggestion, at least so far as the Yanktons were concerned, that less than all of them used the land.

The Commission then went through some arithmetic which we do not question, and concluded that the Yanktons owned an undivided 7% interest in the Sioux

Fort Laramie lands, while the Tetons owned the remaining 93% interest in those lands.

The Yanktons appealed to the Court of Claims, asserting that the Commission's revised decision was not based, as it statutorily had to be (*see* 25 U.S.C. § 70s, Appendix G) on substantial evidence, but was in fact contradicted by all the evidence in the record, which clearly inferred that Yankton usage of the Sioux Fort Laramie land was tribal, involving *all* the Yanktons, which is what one would assume anyway in the absence of contrary evidence.

The Yanktons also argued that the Commission had failed to fulfill its statutory responsibility (25 U.S.C. §§ 70s and 70r) to provide a statement of the reasons for its conclusions and to set forth the findings of fact upon which its conclusions were based.

The Court of Claims summarily rejected the Yankton appeal and affirmed the Indians Claims Commission's decision. While indicating that the Commission's stated reason for inexplicably changing its mind was dubious, the court simply declared that the Commission's decision was nevertheless based on substantial evidence and would stand. Appendix A at 14-15. The court did not discuss the matter, or cite what it thought the substantial evidence was.

REASONS FOR GRANTING THE WRIT

THE COURT OF CLAIMS HAS SO FAR ABDICATED ITS STATUTORY APPELLATE REVIEW RESPONSIBILITIES AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWERS OF SUPERVISION IN ORDER TO MAINTAIN THE INTEGRITY OF THE APPELLATE PROCESS IN INDIAN CLAIMS COMMISSION CASES

Section 20(b) of the Indian Claims Commission Act, 25 U.S.C. § 70s(b), Appendix G, imposes upon the Court of Claims the express duty to review the decision of the Commission to ascertain "*whether the findings of fact of the Commission are supported by substantial evidence,*" and whether the legal conclusions are "*valid and supported by the Commission's findings of fact.*" In this instance the Court of Claims did no such thing. It could not have done so and concluded, as it did, that there was substantial evidence to support the determination that the Yankton interest was 7%.

The simple truth of the matter is that there is not a single document in the record supporting the Commission's conclusion that three out of every four Yanktons (or *any* Yanktons, for that matter) did not use the Sioux Fort Laramie lands. The evidence is either silent on the point or it indicates that Yankton use of the Sioux Fort Laramie land was tribal use, *i.e.*, use by the whole tribe. Even the Commission so found. Appendix C, 40 Ind. Cl. Comm. at 460. There is no evidence whatsoever of any Yanktons who did not share in that use. The Tetons cited none, nor did the Commission, nor did the Court of Claims.

If this is true, as it is, then justice is not done or seen to have been done when the reviewing court affirms the Commission's out-of-the-air finding that only 25%

of the Yanktons used the land by doing no more than incanting the phrase that the Commission's decision was based on substantial evidence, without indicating what that evidence is. Where the evidence is conflicting, the failure to cite the evidence believed to be true is more understandable than here, where the evidence is not in conflict, and supports only one conclusion, that the entire tribe, not part of it, used the land. Surely, 29 years of litigation should not end on such a miscarriage of justice.

Only the exercise by this Court of its supervisory responsibility over the Court of Claims by issuing the writ sought can correct such manifest injustice and maintain the integrity of the appellate process in Indian Claims Commission cases.

CONCLUSION

The writ of certiorari should issue.

Respectfully submitted,

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April 7, 1980

APPENDIX

APPENDIX A

In the United States Court of Claims

(Decided February 20, 1980)

Appeal No. 4–78
Ind. Cl. Comm. Docket No. 74

THE UNITED STATES, Appellant v.
THE SIOUX TRIBE, ET AL., Appellees

Craig A. Decker, with whom was *Assistant Attorney General James W. Moorman*, for appellant.

Arthur Lazarus, Jr., for appellees. *Fried, Frank, Harris, Shriver & Kampelman, Marvin J. Sonosky, Sonosky, Chambers & Sachse*, and *William Howard Payne*, of counsel.

Appeal No. 6–78
Ind. Cl. Comm. Docket No. 332–C

THE YANKTON SIOUX TRIBE, Appellant v. THE UNITED STATES, Appellee

Charles A. Hobbs for appellant. *Angelo A. Iadarola*, attorney of record. *Frances L. Horn, John Michael Facciola*, and *Wilkinson, Cragun & Barker*, of counsel.

Arthur Lazarus, Jr., for The Sioux Tribe, et al.

Craig A. Decker, with whom was *Assistant Attorney General James W. Moorman*, for appellee.

Before FRIEDMAN, *Chief Judge*, KUNZIG and BENNETT, *Judges*.

ON APPEALS FROM THE INDIAN CLAIMS COMMISSION

FRIEDMAN, *Chief Judge*, delivered the opinion of the court:

These two consolidated cases are on appeal from decisions of the Indian Claims Commission concerning compensation for lands the United States acquired pursuant to a treaty with the Sioux Nation signed on April 29, 1868. 15 Stat. 635. The treaty effected the cession of a large part of the land the Sioux owned in North and South Dakota, Nebraska, Wyoming, and Montana. It also established a reservation for the Indians and obligated the United States to provide services and goods, and to make payments to the Sioux.

In the first stage of this litigation, the Indian Claims Commission determined what interest the Indians had in the ceded lands. *Sioux Tribe* v. *United States*, 24 Ind. Cl. Comm. 147 (1970), *aff'd in part*, 205 Ct. Cl. 148, 500 F.2d 458 (1974). In the second stage the Commission found that the value of the land at the time of cession in 1869 was $45,685,000. *Sioux Tribe* v. *United States*, 38 Ind. Cl. Comm. 469 (1976). The Commission then ruled that the United States could not deduct any of the statutory offsets (see below) from the award, and awarded the plaintiffs $43,949,700. *Sioux Tribe* v. *United States*, 42 Ind. Cl. Comm. 214, 257 (1978). The appeal in No. 4–78 is by the United States from the Commission's decision barring any offsets against that award.

The other appeal, No. 6–78, is by the Yankton Sioux, one tribe in the Sioux Nation, from an earlier Commission determination that the Yankton Sioux are entitled to only 7 percent of the total award. *Sioux Nation* v. *United States*, 41 Ind. Cl. Comm. 160 (1977).

We reverse the Indian Claims Commission decision in No. 4–78 and uphold the decision in No. 6–78.

I. NO. 4–78

A. Paragraph 3 of the Indian Claims Commission Act, 25 U.S.C. § 70a (1976), provides that "[i]n determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim." The Indian Claims Commission ruled and the Sioux here argue that the amounts the United States paid to the Indians pursuant to the 1868 treaty were not "payments . . . on the claim," so that none of the payments should be offset in determining the amount of the Sioux's recovery. The rationale for this conclusion is as follows: The 1868 treaty was not a treaty ceding land but a peace treaty. The payments the United States made and the goods and services it provided pursuant to this treaty therefore were made in return for the peace the Sioux undertook to maintain rather than the land the Sioux ceded. Since the claim of the Sioux in this case is that they received an inadequate amount for the land they ceded by the 1868 treaty, those payments were not "on the claim."

The critical inquiry, therefore, is the character of the 1868 treaty: Was its basic purpose and effect the termination of hostilities between the Sioux and the United States and the maintenance of peace between them? We conclude that the treaty cannot be so characterized. To the contrary, the language of the treaty, the history of its negotiation, and the provisions of similar treaties negotiated with other Indian tribes at the same time indicate that the Sioux treaty was in major part a treaty of cession. Thus, the payments the government undertook to make and the goods and services it undertook to supply to the Sioux were, at least in substantial part, compensation for the land the Indians ceded to the government. *Nez Perce Tribe* v. *United States*, 24 Ind. Cl. Comm. 429, 432 (1971). The government accordingly is entitled to show which of the payments made and goods and services provided under the treaty were "payments . . . on the claim" that are to be offset against the award.

1. After providing in Article I for the cessation of war and the maintenance of peace, Article II of the treaty established a reservation for the Sioux "set apart for [their] absolute and undisturbed use and occupation . . . ." In

turn, the Sioux agreed that, "henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided."

In Article XI the Sioux, "[i]n consideration of the advantages and benefits conferred by this treaty and the many pledges of friendship by the United States . . . stipulate[d] that they will relinquish all right to occupy permanently the territory outside their reservation," but the Indians "reserved the right to hunt" on certain lands outside the reservation "so long as the buffalo may range thereon in such numbers as to justify the chase." In the same article, the Indians agreed to withdraw their opposition to the construction of railroads and military posts on the land outside the reservation, and to refrain from attacking, capturing, or killing white emigrants.

Article XV stated that after certain buildings had been constructed on the reservation, the Indians would regard the reservation as their permanent home and would "make no permanent settlement elsewhere," although they retained the right to hunt as stated in Article XI.

Article XVI provided that another tract of the Sioux land wouid be held and considered as "unceded Indian territory," upon which no white people were to settle and over which no white persons were to pass. The United States agreed to abandon its military posts in that area and to close the roads leading to them and to white settlements in Montana.

These provisions show that the cession of land was a major purpose and effect of the treaty. In Article II the Sioux explicitly "relinquish[ed] all claims in or to any portion of the United States or Territories" outside the reservation. In Article XI they similarly "relinquish[ed] all right to occupy permanently the territory outside their reservation," and in Article XV they agreed to "make no permanent settlements" except on the reservation.

The qualifying language in Article II "except as hereinafter provided" refers to the provision in Article XI by which the Sioux retained certain hunting rights, and the provision in Article XVI treating other land as "unceded Indian land." The exception makes it clear that

the cession of all land outside the reservation does not include the latter two interests that the Sioux retained. Indeed, the reference to "unceded Indian land" in Article XVI is inconsistent with the argument that the treaty was not one of cession. The provision that under the treaty certain land would be "unceded" necessarily indicates that other land was being ceded.

Articles II, XI, and XV each provided specified consideration for the particular land cessions there described. In Article II the United States guaranteed that the Indians would have exclusive undisturbed use and control over the reservation lands in return for which the Indians relinquished the other lands. Article XI stated that the Sioux were relinquishing the right permanently to occupy land outside the reservation, "[i]n consideration of the advantages and benefits conferred by this treaty and the many pledges of friendship by the United States"—which also included the recognition in that article of the Indians' right to hunt outside the reservation. In Article XV the Sioux agreed that when the United States had built certain facilities on the reservation, as promised in Article IV, the Indians would make their permanent homes there, thereby giving up the occupancy of land outside that area.

The Sioux argue that because they were a nomadic people, they gave up nothing when they relinquished their right to settle permanently outside the reservation but retained their right to hunt. Although the Sioux were concerned in the treaty negotiations with retaining and protecting their hunting rights, they also wanted to remove and exclude the white people from their lands entirely. See the discussion below.

Like all treaties, the Sioux treaty of 1868 was a compromise. The Sioux obtained a reservation for their exclusive undisturbed use, retained the right to hunt on other lands as long as those lands had sufficient game, and would receive various payments, goods, and services from the United States. In return, they ceded substantial portions of their land to the United States. Although the treaty also provided in Article I that war between the parties would cease and that both sides would keep the peace, the treaty cannot properly be viewed as solely or

even primarily a peace treaty. Its various provisions show that in major part it was a treaty of cession.

2. The background of the treaty and the negotiations leading to it support the conclusion that it was a treaty of cession.

In the 1860's, following the discovery of gold in Montana, white settlers began to emigrate across Sioux lands. Their primary route was along the Powder River Road, in the heart of the Sioux hunting lands. The disruptions caused by white emigrants led to disputes and eventually to the establishment of forts by the United States to protect the road. The Sioux reacted to the Army presence by waging war, in which they were highly successful.

The United States concluded it had two options: to fight a long and costly war or to try to make peace. It chose the latter course and appointed an Indian Peace Commission. 15 Stat. 17 (1867).

The primary concern of the United States was insuring the safety of white emigrants, but a peace treaty alone was not thought adequate to accomplish that objective. During the discussions leading up to appointment of the commission, it was repeatedly stated that the Indians would have to be moved onto a reservation. *See, e.g., Sioux Tribe* v. *United States*, 42 Ind. Cl. Comm. 214, 236–40 (1978) (findings of fact 65, 70, 73). The statute establishing the Peace Commission, moreover, included as one of the goals of the mission the selection of an appropriate site for a permanent Indian reservation located away from highways and railroad routes. Section 2, 15 Stat. 17.

The record of the negotiations between the commission and the Sioux shows that the Indians did not want to give up their land, and that on occasion government representatives told the Indians they would not have to do so. On the other hand, the major concern of the Sioux was that they be permitted to continue to hunt as long as the game remained, and the commission promised that they could do so, as the treaty provided in Article XI. *See, e.g., Sioux, supra*, 42 Ind. Cl. Comm. at 246–51 (findings of fact 86, 87, 89). General Sanborn, a member of the commission, twice told the Sioux that the United States was asking them only that they "surrender" "such lands as no longer afford you

any game." Plaintiffs' Statement of Facts to the Indian Claims Commission, pp. 152–53, 155, 157.

The Sioux in 1868 may not fully have understood the white man's concept of land ownership, and as a nomadic people they may have thought that they continued to "own" land as long as they could hunt on it. The statements by commission members that the Indians would not have to give up their land may have been intended only to inform the Indians that they could retain their hunting rights, and the Sioux could have so understood the statements. The treaty, however, distinguished among three categories of Sioux land: (1) the reservation, which was set apart for the Indians' "absolute and undisturbed use and occupation" and which would become their permanent home; (2) land that was "unceded"; and (3) land upon which the Sioux retained hunting rights as long as the game remained—a category that was different from the "unceded" land.

The Peace Commission Report shows that translators fully explained the terms and provisions of the treaty to many leaders of the Sioux. For example, Red Cloud, one of the Sioux chiefs, required three days of explanation before he would sign. Considering all the circumstances, it cannot be concluded that the Sioux were unaware when they signed the treaty that they were ceding to the United States a significant portion of their land or that they believed that the money payments the United States agreed to make and the goods and services it undertook to provide were not in return for the land they were surrendering. As Red Cloud complained when he did not receive all of the goods promised to him in the treaty, "They held out a paper for me to sign and that is all I got for my land." Plantiffs' Statement of Facts to the Indian Claims Commission, pp. 152–53.

3. The treaty between the Sioux and the United States was one of a series of agreements negotiated by the same commissioners with Indian tribes in the late 1860's.[1]

[1] Treaty with the Eastern Band of Shoshones and Bannock Tribe, *proclaimed* Feb. 24, 1869, 15 Stat. 673; Treaty with the Northern Cheyenne and Northern Arapahoe Tribe, *proclaimed* Aug. 25, 1868, 15 Stat. 655; Treaty with the Kiowa and Comanche Tribes, *proclaimed* Aug. 25, 1868, 15 Stat. 581; Treaty with the Cheyenne and Arapahoe Tribes, *proclaimed* Aug. 19, 1868, 15 Stat. 593; Treaty with the Navajo Tribe, *proclaimed* Aug. 12, 1868, 15 Stat. 667; Treaty with the Crow Tribe,

Although none of the other treaties was identical to that the Sioux signed, each contained the same pattern of provisions found in the Sioux treaty. Each begins with mutual pledges of peace. A reservation is then described and set aside for the undisturbed use of the Indians, and all or most of the group's other land claims are relinquished. Next follows a series of sections describing the benefits the Indians will receive and the goods and services the United States will provide. Finally, each treaty recites that no reservation land will be ceded to the United States unless three-fourths of all adult males on the land agree.

The Indian Claims Commission has interpreted four of these agreements as treaties of cession. *Navajo Tribe* v. *United States*, 23 Ind. Cl. Comm. 244 (1970) (interpreting 15 Stat. 667); *Cheyenne-Arapaho Tribes of Okla.* v. *United States*, 10 Ind. Cl. Comm. 1 (1961) (interpreting 15 Stat. 655 and 15 Stat. 593); *Crow Tribe* v. *United States*, 6 Ind. Cl. Comm. 98 (1958) (interpreting 15 Stat. 649). A case based upon a fifth treaty was settled, but the settlement recognized that the treaty ceded land and included offsets against the claim. *Shoshone-Bannock Tribes* v. *United States*, 19 Ind. Cl. Comm. 3 (1968) (interpreting 15 Stat. 673). There is no convincing reason why the Sioux treaty should be viewed differently.

The grounds upon which the Commission and the Indians seek to distinguish those other treaties from the Sioux treaty are unconvincing as a basis for viewing the Sioux treaty alone as one of peace rather than of cession. The Commission differentiated the Crow and Shoshone/Bannock treaties on the ground that because the latter tribes were already at peace with the United States those treaties necessarily were not treaties of peace. Those agreements, however, contained the same mutual pledges of peace as Article I of the Sioux treaty.

These pacts and the Sioux treaty differ from treaties strictly for peace, such as an earlier agreement with the Navajo. Treaty Between the United States of America and the Navajo Tribe of Indians, *proclaimed* Sept. 24, 1850, 9 Stat. 974. That treaty did not include any cession of land and therefore was intended solely to promote amicable

proclaimed Aug. 12, 1868, 15 Stat. 649.

relations between the Navajo and the government. The parties did not specify any payments to be made under the agreement; rather they provided, in Article X, for "such donations, presents, and implements . . . as [the] government may deem mete and proper." The later series of treaties, including the Sioux treaty, on the other hand, ceded Indian interests in land and provided for payments to the Indians in consideration of the treaty concessions.

Another asserted distinction is that only the Sioux treaty contains the phrase "except as hereinafter provided" after the language in Article II establishing a reservation and relinquishing all rights to lands outside it. Elsewhere in the Crow and Shoshone/Bannock treaties, however, the Indians retained the right to hunt and even to settle, although not permanently, outside the reservation. Article IV, 15 Stat. 649; Article IV, 15 Stat. 673. Similar hunting and temporary residency rights were granted in all of the treaties. The Kiowa/Comanche, Cheyenne/Arapahoe, and Navajo treaties, moreover, contain no blanket relinquishment of rights in the provision creating a reservation.

The phrase "except as hereinafter provided" in the Sioux treaty refers to the other provisions in the treaty relating to land, as explained in section 1, *supra*. It merely eliminated a possible ambiguity present in the other treaties. All of the treaties, including the Sioux, (1) established a reservation for exclusive use of the Indians, (2) granted hunting and temporary occupancy rights outside the reservation, and (3) relinquished all rights of the Indians in their land, except those granted in the agreement.

The one major difference between the Sioux treaty and the others is Article XVI, designating a portion of the Sioux lands as "unceded Indian territory." Since this provision does not appear in the other treaties, that may be a reason for the "except as hereinafter provided" language in Article II of the Sioux pact. Moreover, as explained in section 1, *supra*, the reference to "unceded" Indian land is a clear indication that elsewhere in the treaty the Sioux did cede other portions of their territory.[2]

[2] The Sioux cite a finding of this court in *Medawakanton Indians* v. *United States*, 57 Ct. Cl. 357, 370 (1922), that under the 1868 treaty "[t]here were no lands ceded by the Indians to the United States." In *Quick Bear* v. *Leupp*, 210 U.S. 50, 80 (1908),

B. In addition to providing for deductions from the award to reflect "payments . . . on the claim," paragraph 3 of the Indian Claims Commission Act authorizes the Commission to

> inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant . . . .

25 U.S.C. § 70a (1976). Although the Commission has considerable discretion to determine whether to allow gratuitous offsets, that determination must reflect the "entire course of dealings" between the United States and the Indians. In granting the Sioux's motion to bar any consideration of gratuitous offsets, the Commission ignored that requirement, and its decision cannot stand. *Sioux Tribe* v. *United States*, 42 Ind. Cl. Comm. 214, 231–32 (1978).

The ground upon which the Commission denied any gratuitous offsets was that the actions of the United States between 1875 and 1877 in connection with its acquisition of the Black Hills from the Sioux "were grossly dishonorable." *Id.* at 232. After describing those actions, which we summarized in *United States* v. *Sioux Nation*, 207 Ct. Cl. 234, 518 F.2d 1298 (1975), *cert. denied*, 423 U.S. 1016 (1975), the Commission stated that those events "so taint the course of dealings between the United States and the Sioux that we cannot in good conscience offset any gratuitous expenditures by the United States against any Sioux award in this docket." *Sioux Tribe*, *supra*, 42 Ind. Cl. Comm. at 232.

The events involved in this case cover a much longer period than the 3 years upon which the Commission exclusively focused. The treaty itself was negotiated and ratified in 1868 and 1869; its background goes back a

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which the defendant cites, the Supreme Court stated that under that treaty "the Indians made large cessions of land and other rights." To whatever extent such statements are significant, the Supreme Court's views, of which we may not have been aware in the *Medawakanton* case, are entitled to greater weight.

number of years before that; and the payments that the government wants to treat as gratuitous offsets were made well into the twentieth century.

This court has stated that the government is entitled to gratuitous offsets if the entire course of dealings between it and the Indians warrants such action. *United States* v. *Cherokee Nation*, 200 Ct. Cl. 583, 600, 474 F.2d 628, 638 (1973); *Emigrant New York Indians* v. *United States*, 177 Ct. Cl. 263, 287 (1966); *Sioux Tribe of the Lower Brule Reservation* v. *United States*, 161 Ct. Cl. 413, 416, 315 F.2d 378, 380, *cert. denied*, 375 U.S. 825 (1963). In the present case, the Commission did not examine the entire course of dealings between the United States and the Sioux but instead considered only the dealings in the relatively brief period 1875–77. The Sioux already have been awarded full compensation for the government's improper action in those years in taking the Black Hills from them. *Sioux Nation* v. *United States*, 220 Ct. Cl. __, 601 F.2d 1157 (1979), *cert. granted*, 48 U.S.L.W. 3383 (U.S. Dec. 10, 1979).

Paragraph 3 of the Indian Claims Commission Act does not permit the Commission to deny gratuitous offsets solely on the basis of a relatively small portion of the total dealings between the United States and the Indians. Consideration of the entire course of dealings might have led the Commission to conclude that gratuitous offsets should be allowed. The present case, therefore, is unlike *United States* v. *Assiniboine Tribes*, 192 Ct. Cl. 679, 428 F.2d 1324 (1970). There we upheld the Commission's denial of gratuitous offsets where the Commission stated that its decision was based "upon review of the entire course of dealings between the parties . . . ." *Assiniboine Tribe of Indians* v. *United States*, 21 Ind. Cl. Comm. 310, 312 (1969).

C. Since we conclude that the Commission erred in refusing to consider reducing the award by any payments on the claim or gratuitous offsets, the case must be remanded to the Trial Division to determine whether the award should be reduced. In so doing, we do not indicate any view on the application of particular payments to the cession of particular lands, or on the extent, if any, to which the award should be reduced. Those are matters for the trial judge to determine in the first instance. We hold

only that the Commission erred in totally barring consideration of those items.

II. NO. 6–78

The Teton Sioux Tribe and the Yankton Sioux Tribe are two tribes of the Sioux Nation that had an interest in the Sioux lands for which the Commission made the award in this case. The Yankton Sioux appeal in No. 6–78 challenges the Commission's determination that the Yanktons had only a 7 percent interest in those lands, and therefore are entitled to 7 percent of the award.

In an earlier decision in this case, the Commission concluded that since both the Tetons and the Yanktons had recognized title to the land involved, their respective interests in the land should be determined on the basis of the populations of the two tribes. This calculation gave the Yanktons a 17 percent interest in the land and the Tetons an 83 percent interest. *Sioux Nation* v. *United States*, 24 Ind. Cl. Comm. 147, 158 (1970).

On appeal, we stated that "[t]he formula for assigning the interests on a total population basis . . . may not be appropriate in this instance," since "comparing the total population of the two divisions of the Sioux treats the Yanktons as if they all were using the Fort Laramie land, when, in fact, only a portion of the Yankton Sioux may have actually used this territory." *Sioux Tribe* v. *United States*, 205 Ct. Cl. 148, 167, 500 F.2d 458, 467 (1974). We stated that "the best method for determining the respective interests of the Tetons and the Yanktons in the Fort Laramie land is by assigning the interests on the basis of the number of Tetons and Yanktons who actually used and occupied the land." *Id.* Our disposition of this case was as follows:

> We remand this portion of the case to the Indian Claims Commission to determine whether there is sufficient evidence of actual use to apportion the land on the basis of the comparative population of the Teton and Yankton divisions of the Sioux actually using the Fort Laramie land. If there is sufficient evidence, the apportionment should be made on that basis. On the other hand, if the parties are unable, after being given a reasonable opportunity to do so, to produce sufficient evidence to enable the Commission to apportion the interests in the land on that basis, the apportionment previously made by the Commission in its order of December 2, 1970, will be acceptable.

Sioux Tribe, supra, 205 Ct. Cl. at 170, 500 F.2d at 469.

Following the remand, the Commission initially adhered to its apportionment of 17 percent to the Yanktons and 83 percent to the Tetons. *Sioux Nation* v. *United States*, 40 Ind. Cl. Comm. 454 (1977). It stated that although the evidence showed that a "far greater" number of Tetons than Yanktons used the area, it was "unable to discover what approximate number of each sub-tribe this represents." *Id.* at 474. It concluded that "since we are unable to determine the number of Tetons and Yanktons actually using and occupying the Sioux-Fort Laramie lands, under the remand order of the Court of Claims we are compelled to adopt that apportionment previously made by this Commission in our order of December 2, 1970." *Id.* at 475.

On the Tetons' motion for rehearing, on which it heard oral argument, the Commission vacated its prior order and ruled that the Yanktons had a 7 percent interest and the Tetons a 93 percent interest. *Sioux Nation* v. *United States*, 41 Ind. Cl. Comm. 160 (1977). It stated that its prior decision "was based on too narrow a reading of the mandate of the Court of Claims," which it had interpreted "as requiring us to determine from the evidence the exact numbers of Tetons and Yanktons which were using the . . . land." *Id.* at 164. The Commission stated that "[a] careful rereading" of the decision of this court "indicates that the court did not expect such an exact determination by the Commission" and that the mandate would be satisfied by "[a] determination of the comparative populations of the two groups using the land, or the percentage of the total population of each group using the land." *Id.*

The Commission "reexamined the record" and concluded that the findings in its initial decision on remand "are sufficient for us to determine the approximate percentage of each Sioux group that was using the Sioux-Fort Laramie lands." *Id.* "Upon weighing the evidence, including contemporary sightings and reports, and the testimony of the expert witnesses, the Commission is of the opinion" that approximately 25 percent of the Yanktons "used and occupied the land." *Id.* at 165. Applying this percentage to

the total population of the various Sioux groups, the Commission concluded that the Yanktons had a 7 percent interest in the land. *Id.* at 165–66.

It is a well established principle that an administrative agency may reconsider its own decisions. "The power to reconsider is inherent in the power to decide." *Spanish Int'l Broadcasting Co.* v. *FCC*, 385 F.2d 615, 621 (D.C. Cir. 1967) (quoting *Albertson* v. *FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950)); *accord, Dayley* v. *United States*, 169 Ct. Cl. 305, 308 (1965). Pursuant to its statutory authority (25 U.S.C. § 70h) to establish rules of procedure, the Indian Claims Commission provided in Rule 33 of its General Rules of Procedure that any party may seek reconsideration within 30 days of a final Commission determination. 25 C.F.R. § 503.33(a) (1979). The decision to grant or deny rehearing lies within the agency's discretion, and "[o]nly a showing of the clearest abuse of discretion could sustain an exception to that rule." *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535 (1946); *cf. Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 515 (1944).

The stated basis upon which the Commission granted rehearing in this case is unconvincing. The statement in the second opinion that in its first decision the Commission had interpreted our decision as requiring it to determine "the exact number" of Tetons and Yanktons who used the land seems inconsistent with the statement in the Commission's first opinion that the agency could not determine "what approximate number" of Tetons and Yanktons "actually" used and occupied the land. But despite the dubiety of the Commission's articulated reason for granting rehearing and whatever may be the real explanation for that action, we cannot say that in granting rehearing the Commission abused its discretion.

On granting rehearing the Commission vacated its earlier order. Our function on this appeal is not to second-guess the Commission's decision to rehear, but to determine whether its new decision rendered on rehearing itself is supported by substantial evidence. *Confederated Tribes of Warm Springs Reservation* v. *United States*, 177 Ct. Cl. 184, 192, 193, 195 (1966). Our review of the record leads us to conclude that substantial evidence supports the Commission determination that the Yankton Sioux had a 7 percent

interest in the land. We therefore affirm the Commission's order on that point.

CONCLUSION

In No. 4–78, the decision of the Indian Claims Commission is reversed, and the case is remanded to the Trial Division to determine the merits of defendant's claim for offsets based on both alleged payments on the claim and gratuitous offsets.

In No. 6–78, the decision of the Indian Claims Commission is affirmed.

APPENDIX B

40 Ind. Cl. Comm. 160

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 74

Docket No. 332-C

[Decided: December 27, 1977]

THE SIOUX NATION, *et al.*,
THE YANKTON SIOUX TRIBE OF INDIANS,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

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* * *

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

The Commission has before it Docket 74 plaintiffs' motion for rehearing of our decision of August 25, 1977, in these consolidated dockets, 40 Ind. Cl. Comm. 454. In that decision the Commission determined that there was not sufficient evidence in the record to apportion the Sioux-Fort Laramie lands on the basis of the numbers of each Sioux tribe which actually used the land. Therefore, based on its interpretation of the remand order of

the Court of Claims, 205 Ct. Cl. 148 (1974), [*160/161*] the Commission reentered its determination of December 2, 1970, 24 Ind. Cl. Comm. 147, that the Yankton Sioux held a 17% interest, and the Teton Sioux an 83% interest, in the Sioux-Fort Laramie area.

The Docket 74 plaintiffs (Tetons) move for rehearing on three grounds. First, they assert that the Commission's finding that during the period 1838 through 1858 Fort Lookout was located west of the Missouri River (finding 2, 40 Ind. Cl. Comm. 477) is contrary to prior Commission findings and the evidence. Second, they assert that many of the Commission's remaining findings are erroneous, and that the Commission failed to find many significant facts. Third they contend that the Commission erred as a matter of law in failing to carry out the remand order of the Court of Claims. The Docket 332-C plaintiff (Yankton) supports the Commission's decision as being correct both in fact and law. For the reasons indicated below, the Commission concludes that its decision of August 25, 1977, was erroneous. We shall grant the Tetons' motion for rehearing.

Fort Lookout

The Tetons assert that the Commission's finding on Fort Lookout is contrary to findings entered in Docket 332-C in 1970 (*Yankton Sioux Tribe v. United States*, 24 Ind. Cl. Comm. 208, 228-32). We have reexamined those findings, and find no inconsistency with a conclusion that Fort Lookout was west of the Missouri.

The findings referring to Agent Moore, Agent Hatton, and Agent Vaughn, do not locate Fort Lookout either east or west of the Missouri. The finding referring to Agent Redfield was quoted out of context by [*161/162*]

the Tetons. The actual finding stated that Redfield found Yankton villages "on the eastern bank of the Missouri above the Big Sioux River, in the vincinity of the James River, at Fort Randall, and at Fort Lookout." 24 Ind. Cl. Comm. at 231. The Teton position seems to be that the Commission placed each of these sites "on the eastern bank of the Missouri." The record is clear, however, that Port Randall was west of the Missouri. Therefore, this Teton assertion is erroneous.

As to the finding on Warren, the Commission did find that he reported the Yanktons north of the Missouri between the Big Sioux River and Fort Lookout. However, Warren was merely using Fort Lookout as a well-known landmark on the Missouri. Warren's statement no more locates Fort Lookout east (or north) of the Missouri than does Denig's statement (40 Ind. Cl. Comm. at 474), that the Yanktons were east of the Missouri between the Vermillion and Fort Pierre, place Fort Pierre east of the river.

The Tetons further assert that the finding on Fort Lookout was contrary to the testimony of the experts in the case. This is true only in part. Dr. John L. Champe, expert witness for the Yanktons, testified that Fort Lookout was west of the Missouri River for the entire period covered by the evidence. Tr. Vol. III, pp. 152-56, 161-68.

Finally, the Tetons contend that there is no support in the record for the Commission's finding on Fort Lookout. This is not true. There are no less than nine maps in evidence which show Fort Lookout on the west side of the Missouri. *See* Sioux Exhibits 509, 512, 515, 516, 519, [*162/163*] Yankton Exhibits M-2, M-5, M-6, Docket 332-A Plaintiff's Exhibit 269. We were unable to find any maps which placed it east of the river.

In sum we conclude that our finding that Fort Lookout was west of the Missouri River is supported by a preponderance of evidence and is correct.

Miscellaneous Factual Errors

The Tetons contend that the Commission has made five other factual errors. We have reexamined the evidence, and we find that with respect to the Kearny-Cooke expedition (finding 17), and the report of Agent Redfield (finding 64), the Tetons are correct. We have therefore entered amended findings.

Error of Law

Docket 74 plaintiffs contend that the Commission's decision not to reapportion the Fort Laramie land between the Yanktons and Tetons, on the ground that there was insufficient evidence to do so, was erroneous as a matter of law. The Tetons assert that there is sufficient evidence in the record to determine the relative numbers of each group using the land.

The Commission's difficulty with the evidence, and the reasons for its conclusion that the evidence was insufficient to determine the respective numbers of Yanktons and Tetons using the land, is explained in the Commission's opinion, 40 Ind. Cl. Comm. 468-75. The Tetons' motion and the oral argument held November 10, 1977, have now convinced the [*163/164*] Commission that its decision of August 25, 1977, was based on too narrow a reading of the mandate of the Court of Claims.

In our earlier decision we read the court's mandate as requiring us to determine from the evidence the exact numbers of Tetons and Yanktons which were

using the Fort Laramie land. Therefore, when we were unable to determine these numbers with any degree of accuracy, we followed the second part of the court's mandate and reentered our apportionment of December 2, 1970. A careful rereading of the court's decision, however, indicates that the court did not expect such an exact determination by the Commission. A determination of the comparative populations of the two groups using the land, or the percentage of the total population of each group using the land, is sufficient to satisfy the court's mandate.

With this reinterpretation of the court's mandate in mind, we have reexamined the record and conclude that the findings we entered on August 25, 1977, are sufficient for us to determine the approximate percentage of each Sioux group that was using the Sioux-Fort Laramie lands. Specifically, our findings covering the periods immediately preceding and following the Fort Laramie Treaty support the following conclusions: The Oglalas spent a considerable portion of their time outside of the Sioux-Fort Laramie area. Their hunting activities took place mostly in the areas to the south of the North Platte River and to the west of the subject area. The Brules, although also conducting hunting activities outside the tract, did conduct a greater proportion of their activities inside the tract than did the Oglalas. The [*164/165*] Minneconjous also conducted some of their activities to the south and west of the Sioux-Fort Laramie area, but the greater portion of their time was spent within the Sioux-Fort Laramie lands. The Sans Arcs, Hunkpapa, Two Kettle, and Blackfeet Sioux were almost always located within the subject area. The more northern Teton bands did spend part of their time east of the Missouri, and were credited, along with the

Yanktonais, with aboriginal title to lands east of the river (*see* 23 Ind. Cl. Comm. 419). The Yanktons spent most of their time east of the Missouri River in Royce Area 410. However, there was Yankton activity in the Sioux-Fort Laramie lands, particularly in that area close to the Missouri.

Upon weighing the evidence, including contemporary sightings and reports, and the testimony of the expert witnesses, the Commission is of the opinion that around the time of the Fort Laramie Treaty of 1851 approximately two-thirds of the Brules, 30% of the Oglalas, 75% of the Minneconjous, 90% of the Two Kettle, Hunkpapa, Sans Arcs, and Blackfeet Sioux, and 25% of the Yanktons used and occupied the Sioux-Fort Laramie lands.

The Commission has previously made findings on the total populations of the various Sioux groups. *See* 24 Ind. Cl. Comm. at 173-74.[1] Applying [*165/166*] to these population figures the percentage of usage indicated above, we are able to calculate the respective interests of

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[1] Those findings show the respective band populations, counted in lodges, as follows:

	Vaughan-Twiss	*Harvey*	*Warren*
Brule	400	260	380
Oglala	450	350	460
Minneconjous	225	385	200
Blackfeet	150	160	165
Two Kettle	165	60	100
Hunkpapa	280	380	365
Sans Arc	160	150	170
Yankton	375	375	360

the Yanktons and the Tetons in the Sioux-Fort Laramie lands.[2]

Based on these calculations, the Commission concludes that the Yankton Sioux held an undivided 7% interest, and the Teton Sioux an undivided 93% interest, in the Sioux-Fort Laramie lands.

/s/ John T. Vance, Commissioner

We concur:

/s/ Jerome K. Kuykendall, Chairman

/s/ Richard W. Yarborough, Commissioner

/s/ Margaret H. Pierce, Commissioner

/s/ Brantley Blue, Commissioner

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[2] For example, using the Vaughan-Twiss figures, and multiplying by the above indicated percentages, we get the following results:

	Total Population	×	*% of use*	=	*Population Using Land*
Brule	400		66-2/3		267
Oglala	450		30		135
Minneconjous	225		75		169
Blackfeet	150		90		135
Two Kettle	165		90		149
Hunkpapa	280		90		252
Sans Arc	160		90		144
Yankton	375		25		94
					1,345

Yankton: 94 lodges out of 1,345 = 7%
Teton: 1,251 lodges out of 1,345 = 93%

The Commission used the same method with the Harvey and Warren estimates.

APPENDIX C

40 Ind. Cl. Comm. 454

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 74
Docket No. 332-C

[Decided: August 25, 1977]

THE SIOUX NATION, *et al.*,
THE YANKTON SIOUX TRIBE OF INDIANS,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

OPINION OF THE COMMISSION

Vance, Commissioner delivered the opinion of the Commission.

This matter is now before the Commission on remand from the Court of Claims. The court was reviewing, among others, our decision of December 2, 1970, 24 Ind. Cl. Comm. 147. In that decision, this Commission determined that the term "Sioux or Dahcotah Nation" as that name was used in the Fort Laramie Treaty of 1851 referred only to those bands of Indians comprising the Teton and Yankton sub-tribes, effectively excluding the Yanktonais. The Commission further concluded that the Teton [*454/455*] Sioux possessed an undivided 83% interest in the Sioux-Fort Laramie territory and that the

Yankton Sioux possessed a 17% interest in that same land. This conclusion was based on our determination that the respective interests of the two sub-tribes should be calculated on the basis of the total populations of each.

In its decision, 205 Ct. Cl. 148, the Court of Claims affirmed our determinations that only the Tetons and Yanktons were included within the term "Sioux or Dahcotah Nation", and that the populations of the two groups constituted 83% and 17% respectively of the whole. However, the court determined that it was the intent of Congress to recognize title in those Sioux Indians who actually were using the land. The court remanded the case to the Commission in order for us to determine from the evidence, if possible, the actual number of Tetons and Yanktons using the "Fort Laramie land" and to apportion the award accordingly.

Responding to the dictates of the court's remand, our duty is to apportion the land on the basis of the numbers of Tetons and Yanktons using it. However, if we are unable to do so, after having given the parties a reasonable opportunity to produce sufficient evidence, the previous apportionment made by this Commission in its order of December 2, 1970, will be applied.

One final aspect of the opinion of the Court of Claims relates to the frequent use of the term "Fort Laramie land". Technically, thought the "Fort Laramie land" encompassed lands other than the area reserved to the Sioux, the Court of Claims implied that we are to examine use and occupancy only of the Sioux tract. However, it is the belief [*455/456*] of the Commission that the proper method would have been to examine the evidence of use and occupancy of the entire lands affected by the Fort Laramie Treaty.

We believe that the actual intention of Congress was to negotiate with those Sioux using and occupying lands within the overall treaty area, regardless whether they used and occupied lands within the tract reserved to the Sioux. Nowhere in the record does the history and purpose of the treaty suggest that those Sioux using and occupying the concerned tract were the only ones to be negotiated with.

The Court of Claims remanded the case in order for this Commission to determine the number of Tetons and Yanktons actually using and occupying the "Fort Laramie land". However, the intention of the remand clearly regarded the "Fort Laramie land" as the Sioux-Fort Laramie land. Both parties presented evidence without contesting this facet of the case. We examined the evidence bearing in mind both interpretations and found, in this instance, the results to be the same.

CONTENTIONS OF THE RESPECTIVE PARTIES

The Teton Sioux plaintiffs (Docket No. 74) presented evidence to support a "corner-area theory". Based upon this theory and the evidence presented, it is their contention that the Yanktons used only a small portion of the Sioux-Fort Laramie lands, comprising approximately 4% of the entire area. The Teton Sioux further contend that the Yankton use and occupancy in this area occurred in association with Brule use and occupancy and in country where a portion of the Two Kettle band resided. This factor, they contend, resulted in the Yanktons possessing no more [*456/457*] than a 2½ percent ownership interest in the Sioux-Fort Laramie lands. Moreover, the Docket 74 plaintiffs assert that the Yankton group which held that interest eventually merged into the

Brule and is thus represented in these proceedings by the Teton plaintiffs and not the Yankton plaintiffs. They therefore conclude that the Yanktons possess no present ownership interests in the Sioux-Fort Laramie lands. In addition to the evidence presented concerning the Yanktons, the Tetons presented voluminous evidence to support their contention of full Teton use and occupancy of the Sioux-Fort Laramie area.

The Yankton Sioux (Docket No. 332-C) plaintiffs' equally voluminous evidence attempts to support a finding that the entire Yankton Sioux sub-tribe used and occupied lands within the Sioux-Fort Laramie area. In response to the Teton's corner area theory, the Yanktons contend that their use and occupancy occurred in areas well beyond the area where the Tetons would have confined the Yankton activities. The Yanktons further dispute the corner area theory by arguing that the Court of Claims' decision dealt with population and not geographical use.

Besides presenting evidence of Yankton use and occupancy within the Sioux-Fort Laramie lands, the Yankton Sioux presented additional evidence establishing Teton activities outside of the Sioux-Fort Laramie area allegedly reducing their number actually using and occupying the subject area.

In conclusion, the Yankton plaintiffs assert that the evidence is not sufficient to determine the number of Yankton who were or were not using and occupying the Sioux-Fort Laramie area. Moreover, they contend [*457/458*] that the substantial number of Tetons not using the area at the time of the treaty also can not be estimated. It is the Yankton's position that the evidence is insufficient to enable the Commission to determine the numbers of each respective sub-tribe actually using

and occupying the Sioux-Fort Laramie lands. Hence, the Yanktons' contention would ultimately require the imposition of the Commission's earlier method, to wit: 83% Teton and 17% Yankton.

PERIOD OF YEARS EXAMINED FOR EVIDENCE OF USE AND OCCUPANCY

At the trial on remand, both parties presented evidence of use and occupancy occurring as far back as the late 1700's and early 1800's. However, other than possibly disclosing lifestyle and migratory patterns decades prior to the Fort Laramie treaty, such reports cannot help us in determining the respective use of the Sioux-Fort Laramie lands by the Tetons and Yanktons at the time of the Fort Laramie Treaty.

We are concerned primarily with the years immediately preceding and following 1851. However, to get a complete picture of the land use patterns during these years, it is necessary to look at evidence covering a broader period of time. We conclude that a scrutiny of the years from 1838 to 1858 should provide sufficient evidence for us to determine, if such determination is possible, the relative numbers of Tetons and Yanktons actually using and occupying the Fort Laramie lands.

1838-1843

During this period the general ranges of the Yankton sub-tribe and the Teton bands[1] were as follows: The Yanktons ranged from the Vermillion [*458/459*] River to the Missouri River at Fort Pierre, along the Missouri

[1]The Teton sub-tribe was composed of the following bands: Oglala, Brule, Minneconjou, Hunkpapa, Sans Arc, Two Kettle, and Blackfeet.

southward, using lands on both sides of the river. The Oglalas could be found in an area including the Black Hills of South Dakota, stretching southerly to lands lying between the forks of the Platte River. The Brules ranged primarily on the headwaters of the White River and Niobrara River reaching down these rivers towards their mouth, using lands on both sides of the rivers. The Minneconjous ranged along the Cheyenne River. The Hunkpapas, Sans Arcs, Two Kittle, and Blackfeet Sioux were found along the Moreau, the Grand, the Cannonball, and the Heart Rivers.

This period evidenced the expansion of the Oglalas along with some Brules into lands south of the Sioux-Fort Laramie lands. Where earlier these lands were places of occasional visits, they were now common grounds for their activities. Nonetheless, the Oglalas did not entirely abandon areas within the Sioux-Fort Laramie lands. They continued to use and occupy lands within the southwestern portion of the subject area.

Issue arose at the trial regarding John Fremont's sighting of Sioux (and Cheyenne) on the Snake River. The Yanktons contended that this sighting placed these Sioux on the Snake River that flows through Idaho. If so, then these Sioux would have been far outside of the Sioux-Fort Laramie area. However, the Tetons asserted the existence of a Snake Creek east of the Missouri to demonstrate the uncertainty as to where these Sioux actually were. The Commission, in examining maps from this period, discovered that a tributary of the Niobrara River was also called "Snake River". It was located in the southern portion of the Sioux-Fort Laramie lands, not too distant from the Cheyenne-Arapaho land as it was [*459/460*] later delineated by the Fort Laramie Treaty. This discovery did not entail our finding Fremont's sighting as having occurred within the area. Rather, this discovery only increased our doubt as to where the incident actually occurred. The particular band involved was not disclosed.

Stephen Riggs' distinction, in his 1840 report, between the areas in which the Sioux bands "lived" and the areas in which they "hunted" was quite pertinent to our examination. Although a band might be described as "living" within a certain area, its hunting activities over a broader area would, of course, constitute use and occupancy of the larger territory. Thus Riggs' observation that the Yanktons hunted mostly west of the Missouri, although he described them as "living" east of the river, meant that the Yanktons were using and occupying land on both sides of the Missouri.[2] Riggs further noted that the women and children accompanied the men on the buffalo hunts. Therefore, if the band's hunting area was within the Sioux-Fort Laramie area, all the members of that band, whether Teton or Yankton, must be considered to have been using and occupying the area.

Rufus Sage observed that the Indians' dependence upon the chase for subsistence resulted in their being continually on the move in search of game. This transiency meant that Indians sighted in a particular area might well be on the move again within a short time. However, the numerous sightings of Oglalas, for example, tend to localize their activities in the areas where sighted. [*460/461*]

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[2]It is not clear from Riggs' description whether the hunting territory of the Yankton west of the Missouri was inside or outside Sioux-Fort Laramie lands.

1844-1849

The winter of 1844-45 was a harsh and bitter one for the Sioux of the Missouri. Those Indians normally found along the Missouri River and its tributaries were compelled eastward towards the James River in their attempt to avoid starvation. The report of trader Martin McLeon that there were no Teton or Yankton west of the Missouri River implied that it was not unusual for members of these two sub-tribes to be situated at that time of the year on the western side of the Missouri River.

The 1844-49 period revealed the Oglala Band conducting extensive activities in areas south of the North Fork of the Platte River and outside of the Sioux-Fort Laramie area. At times, Brules were spotted with them. Many sightings in this area referred to the Indians as only "Sioux". Since the Yanktons were not known to venture into this area, the "Sioux" sighted were presumably Tetons. However, the particular band could have been one of several or a collection of Indians from a couple of the bands, such as Oglalas and Brules.

One of the major issues of controversy between the two parties concerned the reports of Father DeSmet. Primarily, controversy surrounded his 1848 sighting of Yanktons and Santees on the headwaters of the White and Niobrara Rivers. If these Indians were in the area of what we now know to be the headwaters of these rivers, they would be outside the Docket 74 plaintiffs' proposed corner area. However, the Docket 74 plaintiffs countered DeSmet's report with the contention that DeSmet did not know where the headwaters of the two rivers were located. The Tetons contended that DeSmet believed that the South Fork of the White River was

[*461/462*] the main branch of the White River and that the Keya Paha River was the main branch of the Niobrara River. If so, then the sighting of the Yanktons on the headwaters of these two streams would have left them within the so-called corner area.

DeSmet's indication two years earlier (1846) that the "Badlands" gave rise to the Bad River, the White River, and the Niobrara River, coupled with the location of the "Badlands" on several maps of that period, disclosed that, although DeSmet may not have known exactly where the White and Niobrara Rivers actually took their rise, he did believe that their headwaters were considerably to the west of the South Fork of the White River, in an area near the present Badlands National Monument. Hence, DeSmet encountered the Yanktons west of the Docket 74 plaintiffs' proposed corner area.

DeSmet's 1848 sighting of Yanktons and Santees allegedly keep into Sioux-Fort Laramie lands, although a matter of controversy between the parties, is not crucial to our decision. His sighting was the only one in the record between 1838 and 1858 placing Yanktons that deep into the Sioux-Fort Laramie lands. The location within the Sioux-Fort Laramie lands where these Indians were sighted, however, is not as important to our decision as the fact that they were in the treaty area.

Evidence of activities of the other bands either inside or outside of the Sioux-Fort Laramie area was minimal. War parties would, for example, result in the warriors of the various bands venturing into areas outside of the concerned area. Most of the sightings during this period involved only those Sioux located along the Platte River emigrant roads. Hence, [*462/463*] there was a scarcity of reports on the Yanktons, the Blackfeet Sioux, the

Hunkpapas, the Two Kettles, the Minneconjous, and the Sans Arcs.

1850-1854

During this period, the Yanktons were reported only occasionally within the Sioux-Fort Laramie area. Generally, their activities were confined to a small portion of the treaty area around the vicinity of Fort Lookout. Although Agent Vaughan's report placed Yanktons along both sides of the Missouri River, without disclosing the extent of their activities west of the Missouri, we conclude, from all the evidence, that the area within the Sioux-Fort Laramie lands used by the Yanktons did not extend far from the river. Most of the Yankton activities were conducted between the Missouri and James River.

Evidence in the record indicates that an Oglala Indian asserted at the Fort Laramie treaty council that his band hunted well south of the Sioux-Fort Laramie lands. We find that his statement only referred to where his band "hunted" not to areas where they were considered to "live". Part of the Oglala country was inside of the Sioux-Fort Laramie lands while their hunting territory was predominately outside of the area. Hence, the Oglalas used and occupied areas where they were deemed to "live" and where they were deemed to "hunt". Hunting took up most of the months of the year, but after the hunt was concluded the Sioux resided in areas they regarded as "their country."

Tetons (such as the Minneconjous reported rambling around the "Platte country") sighted in the vicinity of the Platte River could have utilized [*463/464*] lands both inside and outside of the area. The Upper Platte Agency included lands both inside and outside of the

Sioux-Fort Laramie area.

In 1854, the United States Army sought information various bands of the Fort Laramie area in an attempt to determine who was responsible for the attack which resulted in the death of Lt. John Grattan and his men. General Winship in late 1854 discussed the various bands of Sioux who habitually resided south of the Missouri River. His report did not include the Yanktons. A similar report was made by Colonel William Hoffman. Hoffman's report also omitted mention of the Yanktons. The omission of the Yanktons from both of these reports most likely can be attributed to the fact that the Yanktons were known to have had no participation in "Grattan's massacre." It was recognized that several bands of Tetons were the ones responsible.

The various Indian agents' reports, plus those from United States Army sources, revealed that the Hunkpapas, Blackfeet, Sans Arcs, and Two Kettles were almost entirely within the Sioux-Fort Laramie area from 1850 to 1854. The Minneconjous, from all relevant reports, also appear to have spent much of that period within the subject area.[3] The report of Minneconjous rambling around the Platte country for two years did not provide enough information for our determining the extent of their activities outside of the area. [*464/465*]

The evidence did reveal Brule movement through areas both inside and outside of the Sioux-Fort Laramie lands during this period. Though most of the reports placed

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[3]The incident involving the Minneconjou and the cow, resulting in the death of Lt. Grattan and his men, did not reveal any substantial group of Minneconjous in the area. In fact, one of the reports discussing the massacre mentioned that the offender, the killer of the cow, was a stranger from another band of Sioux.

their activities inside the area, it is clear that they used lands outside of the area, particularly when traveling with groups of Oglalas.[4]

The Oglalas, during this period, appeared to spend more time outside of the area than inside. The lands between the forks of the Platte River and further south were frequent regions of Oglala activities. However, it is equally clear that the Oglalas continued to conduct activities inside the Sioux-Fort Laramie lands, primarily along the North Fork of the Platte River, and in the extreme southwestern corner of the Sioux-Fort Laramie area.

In summary, this period showed substantial amounts of the area being both used and occupied by the Tetons. The portion of the area used and occupied by the Yanktons involved only a small portion of land along the Missouri River, between Fort Lookout and Fort Pierre. It is impossible to determine from the evidence how deep into the subject area the Yankton activity extended.

1855-1858

Evidence during this period continued to indicate areas outside of the Sioux-Fort Laramie lands which were used by the Oglalas for hunting. Some reports, such as that of General Scott even placed the entire Oglala country outside of the area. (*See* finding No. 50, *infra*). [*465/466*]

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[4]At times, groups of Tetons were composed of members from several bands. The village in which Lt. Grattan met his demise was an example of such a situation.

Agent Twiss' directive placing the peaceful Brules and Oglalas south of the North Fork of the Platte River disrupted the customary movements of these two bands. They were not free to roam in areas where they might ordinarily be. In fact, some Oglalas actually had to leave areas within the Sioux-Fort Laramie lands in order to abide by Twiss' directive.

A substantial number of war parties were sighted throughout this period. The evidence was not sufficiently detailed for us to discover, for example, whether two sightings of war parties were of two separate groups of Indians or the same group being reported twice. Furthermore, the evidence did not disclose the duration of the war party's activities, and oftentimes failed to disclose how many warriors were from each band. Additionally, these sightings did not reveal where the warriors had left their old men, women, and children.[5]

During this period buffalo and other forms of game were diminishing from areas along the Missouri River. Hence, many of the reports of agents, as well as those of the military and traders in the area, disclosed that the various bands of Tetons, though still using and occupying lands within the Sioux-Fort Laramie area, had moved west from the Missouri River. These bands had not totally abandoned the areas along the Missouri but frequented those areas less often.

As to the Yanktons, F. V. Hayden disclosed in 1855 that when supplied with an abundance of meat they

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[5]The operation of War parties in many of the areas was not a new phenomena. Denig who spent approximately 20 years in the Fort Union area noted that the Hunkpapas had war parties extending into Assiniboine country. Yankton Sioux Exhibit; 55-1.

would reside in the White River valley, [*466/467*] an area inside the Sioux-Fort Laramie lands. However, their location in this area was conditioned upon their having an abundance of meat. This condition, the evidence revealed, was not always satisfied.

The letter to Colonel Cooper (finding 58, *infra*), which described the Big Sioux River area as a favorite winter rendezvous of the Yanktons, Poncas, and Santees, referred only to the Yankton-Santee band known to inhabit the area. This band was far less nomadic than the other Yanktons and needed a far smaller area in which to conduct its activities.

Lt. Warren's 1855 observation of the summer and winter season for the Sioux corroborated other reports describing a larger summer range than winter range. Lt. Warren's comment that in the wintertime the Sioux fixed their lodges in the woods along the banks of lakes and streams affirmed the observation made by Agent Drips 10 years earlier. Neither Warren nor Drips suggested that the Indians' winter habitat was necessarily a part of the land they used and occupied during the summer.

The various geographical reports of the Sioux locations placed the Yanktons outside the Sioux-Fort Laramie lands. These reports either dealt with the "location" or the "country" of the groups identified. These two terms were not necessarily interchangeable. Since the Indians were free to roam in lands of other Sioux bands, the term "locations" might include areas not included in the term "country". As stated earlier, there was no disagreement as to where the Yankton country was located. It was east of the Missouri River, outside of the Sioux-Fort Laramie [*467/468*] lands. The evidence

during this period reveals that the Yanktons had become less nomadic than in previous years, and were starting to lead a life based upon the cultivation of the soil, rather than a life dependent upon the chase. Their reliance upon the hunt had been diminished and consequently their use of lands within the Sioux-Fort Laramie area was diminished. Their lifestyle had changed considerably from that lifestyle existing at the time of the Fort Laramie Treaty Council. Accordingly, this period (1855-58) was not as probative as the other periods in our determination of the probable number of Tetons and Yanktons actually suing the Sioux-Fort Laramie lands at the time of the 1851 treaty.

ANALYSIS

Upon examination of all the pertinent evidence it has become quite clear that we are confronted with a multitude of difficulties in attempting to determine the number of Yanktons and Tetons actually using and occupying the Sioux-Fort Laramie lands.

First, many of the sightings by travelers, missionaries, members of the army, government agents, traders, steamboat captains, etc., were momentary sightings. The Sioux lived a nomadic life. Indians on a hunt could travel close to 50 miles a day. Any sighting of Indians outside the Sioux-Fort Laramie area did not necessarily mean that the next day or two they would still be outside of the area. Similarly, a sighting of Indians inside the area would not necessitate a finding of continued presence there either. [*468/469*]

Second, rarely was a sighting of an entire band. Most often, a sighting was of groups within the band or groups from several bands. To draw a conclusion that the remainder of the band was also in that area would be

improper and clearly unsupported by the evidence. In fact, most sightings completely failed to mention numbers of either Indians or lodges situated within a village.

Third, unless sightings by different sources within the similar time period included a thorough description of the group, we were unable to determine whether such sightings were of the same group or of different groups. Clearly, when the object of the examination is to determine the number of Indians actually using and occupying the Sioux-Fort Laramie lands, it is necessary to know whether two sightings were of the same or of different groups.

Fourth, sightings of Indians near the Sioux-Fort Laramie borders, coupled with evidence of these Indians "being out on a buffalo hunt", were not sufficiently detailed to enable us to determine whether the buffalo being hunted were inside or outside of the Sioux-Fort Laramie lands.

Fifth, numerous sightings and map designations of "Sioux" outside the Sioux-Fort Laramie lands only referred to them as that, failing to mention which sub-tribe or band was being referred to. Again, the Commission's responsibility on this remand is to determine the numbers of Yanktons and Tetons actually using the Sioux-Fort Laramie lands. Sightings of simply "Sioux" prevent our determining the band to which these "Sioux" belonged. [*469/470*]

Sixth, sightings of war parties failed to indicate where the remainder of the band was located. The evidence reveals that war parties were composed of only the warriors, which represented approximately 25% of the entire band. The old men, women, and children

remained behind, situated in ares where their safety would be insured. Hence, the location of approximately 75% of the band was not accounted for in these sightings. Furthermore, the war party did not dwell in lands for a significant period of time. Finally, we felt that war parties were not representative of the nature of activities which would constitute ues and occupancy of land. Therefore, only slight weight, if any, was given to such sightings.

Seventh, there were numerous sightings of Indian villages near Fort Lookout, Fort Pierre, and Fort Laramie. There was no evidence, however, that these were permanent villages. These locations were centers of trade and designated places for the Indians to receive government supplies and provisions, thus making it likely that they would be sighted there. Such sightings were relevant to place the respective Indians in the general proximity of these areas. All three of these locations were on the borders of the Sioux-Fort Laramie lands. Hence, the Indians gathering there could have come from areas outside of the Sioux-Fort Laramie area as well as from within.[6] [*470/471*]

Eighth, from various reports throughout the period (Drips, Thwaites, Warren, and Hayden), the evidence revealed greater Indian movement during the summer season than the winter season. The Sioux, both Yanktons

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[6]Although the parties contested the location of Fort Lookout at the trial, we do not place great importance on its actual location. Though we found Fort Lookout situated west of the Missouri River, it was accessible from across the river. Even if it had been east of the Missouri River, Indians living on the opposite side of the river could have frequented the fort. Moreover, "the Fort Lookout area" was regarded as encompassing lands on both sides of the Missouri River.

and Tetons, were dispersed over a larger area in the summertime. Often a group of Indians would be composed of members of several bands. During winter the Indians would wander over a greatly reduced area and tend to establish villages for a longer period of time. The winter season would afford the best opportunity of finding the Yanktons and Tetons in well-defined areas. Unfortunately, since the westward travelers had to cross the country before winter set in, almost all of the emigrants reports were made during the late spring or the summertime. The winter locations were not well documented, although the evidence did reveal that the Yanktons and Brules would be generally situated on the White River and other tributaries of the Missouri River.

The difficulty with the above situation is that the summer season was not representative of the rest of the year and thus a series of summer sightings could not be applied to establish a year-round residency pattern in the sighted area.

Ninth, several geographically descriptive reports as to Teton or Yankton locations described lands that were prefaced by the term "country". It was conceded by both parties that the Yankton country was east of the Missouri River. This accounts for the placements on various maps of "Yankton" east of the Missouri River. However, it was the contention of the Yankton Sioux plaintiffs that they also roamed or ranged in portions [*471/472*] of the Sioux-Fort Laramie lands. Reports describing the "Yankton country" did not include areas within the Sioux-Fort Laramie lands. However, certain reports describing the range, hunting ground, or occupied areas of the Yanktons did include lands within the crucial area (e.g. Riggs, Vaughan).

The difficulty arises in determining whether a report (different than a sighting) distinguishes between a group's "country" and its "range". A report may place the group's country in one area without considering where else this group may roam. For example, Lt. Warren in one of his reports noted that the Oglalas "lived" between the forks of the Platte (Finding 56, *infra*). However, it was well known at the time that the Oglalas ranged over a much larger area, using and occupying lands other than that lying between the forks of the Platte. Hence, some reports excluded a group from lands within the Sioux-Fort Laramie area though evidence of their presence there was well recognized. How a report was characterized could well determine whether a group was in or out of the area.

Tenth, some sightings alluded to Yankton or Teton activities at locations west of the Missouri River. Not all areas west of the Missouri were within the Sioux-Fort Laramie lands. An example of this situation would be a sighting of Tetons or Yanktons on the Niobrara River, without further clarification. This river runs both inside and outside of the Sioux-Fort Laramie area. Only if the sighting clearly revealed where the Indians were are we able to determine whether they were inside or outside of the Sioux-Fort Laramie lands.

Eleventh, in several of the reports or sightings of the various sub-tribes and bands, the term "Black Hills" was given. Today the Black [*472/473*] Hills designated on maps is an area in western South Dakota and northeast Wyoming entirely within the Sioux-Fort Laramie lands. However, during the period in question the mountain range known today as the Laramie Mountains was also referred to as the "Black Hills". Maps executed during this time bear this fact out. The Laramie Mountains lie

outside of the Sioux-Fort Laramie lands. Fortunately, some sightings were descriptive enough for us to determine which "Black Hills" was intended. Yet, other times the report was not definitive as to which "Black Hills" the Indians frequented.

CONCLUSION

In *Yankton Sioux v. United States,* 97 Ct. Cl. 56, 61 (1942), the Court of Claims found that "both before and after the Treaty of 1858 members of plaintiff's [Yankton] band hunted and roamed in the Sioux lands, as recognized by the treaty of 1851." In the present case the court stated that there was substantial evidence in the record to support this finding. Having examined the evidence in this case, it is clear that such activities existed around the time of the 1851 treaty as well. However, the evidence does not disclose the proportion of Yanktons using the subject area.

There was far more evidence in the record relating to Teton activities than to Yankton activites. The primary reason for this is that the westward route most emigrants traveled was through lands inhabited by Oglalas and Brules and other Teton bands, but not by Yanktons. [*473/474*]

Nonetheless, the record clearly reveals that the Yanktons did conduct a significant amount of their activities in areas between Fort Lookout and Fort Pierre, on both sides of the Missouri River. Though their coverage of the Sioux-Fort Laramie lands was far less extensive than the Tetons, the Yanktons did use and occupy lands within the subject area. Likewise, the Tetons were also using and occupying the area, though large numbers of Oglalas along with a substantial number

of Brules were residing in areas outside of the Sioux-Fort Laramie lands. What number of Indians this involved is unknown.

Cognizant of the Court of Claims decision, we are examining the evidence to determine the number of Tetons and Yanktons actually using and occupying the Sioux-Fort Laramie lands. The evidence reveals that the number of Tetons using the area was far greater than the Yanktons. However, we are unable to discover what approximate number of each sub-tribe this represents. Clearly, from the evidence we cannot determine whether all or simply a portion of the Yanktons or Tetons were involved in the use and occupancy activities.

The geographic or corner area theory propounded by the Docket 74 plaintiffs is unacceptable. It does not conform to the mandate of the Court of Claims. The Court of Claims held that the proper basis for allocating the interests between the two parties would be to determine the percentage of the total population of each of the claimants which actually used and occupied the Siouc-Fort Laramie lands.

Adhering to the Court of Claims remand, we are looking for numbers of Indians actually using and occupying the pertinent area. The apportionment [*474/475*] is to be resolved by evidence of use and occupancy, not by evidence of the extent of the treaty area being used and occupied. How large or small an area this might entail is irrelevant to the court's mandate.

In addition, the evidence does not support the existence of a Brule-Yankton merger that would diminish the number of Yanktons using and occupying the Sioux-Fort Laramie lands.

The Yankton home-country was east of the Missouri River and maps designated Yankton country as being outside of the Sioux-Fort Laramie lands. However, the Yanktons did use and occupy lands within the Sioux-Fort Laramie area. The evidence is insufficient for us to determine how many Yanktons, used and occupied lands within the Sioux-Fort Laramie area. Similar difficulty exists for the Oglala and Brule bands. Accordingly, since we are unable to determine the number of Tetons and Yanktons actually using and occupying the Sioux-Fort Laramie lands, under the remand order of the Court of Claims we are compelled to adopt that apportionment previously made by this Commission in our order of December 2, 1970.

/s/ John T. Vance, Commissioner

We concur:

/s/ Jerome K. Kuykendall, Chairman

/s/ Richard W. Yarborough, Commissioner

/s/ Margaret H. Pierce, Commissioner

/s/ Brantley Blue, Commissioner

[*475/476*]

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40 Ind. Cl. Comm. 454

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 74

Docket No. 332-C

[Decided: August 25, 1977]

THE SIOUX NATION, *et al.*,
THE YANKTON SIOUX TRIBE OF INDIANS,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

FINDINGS OF FACT

The Commission makes the following findings of fact which are supplemental to findings of fact 13 through 35 previously entered on December 2, 1970, 24 Ind. Cl. Comm. 147. Findings of fact 1 through 14, entered in Docket 332-C on December 14, 1970, 24 Ind. Cl. Comm. 208, are hereby incorporated by reference into these findings. For reasons of simplicity, we shall renumber findings in this consolidation beginning with number 1.

General Findings

1. **Description of the Sioux-Fort Laramie Lands.** The area of land reserved to the Sioux under the 1851 Fort Laramie Treaty generally covered a region bordered by

the Missouri River on the east, the North Fork of the Platte River on the south, the Powder River on the west, and the Heart River on the north.

This region presently includes portions of the following states: eastern Wyoming; northwestern Nebraska; South Dakota, west of the Missouri River; southwestern North Dakota; and extreme southeastern Montana. [*476/477*]

2. **Location of Fort Lookout.** During the period 1838 to 1858 Fort Lookout referred to a location on the west bank of the Missouri River several miles north of the mouth of White River. This was inside the Sioux-Fort Laramie lands. In the vicinity of Fort Lookout, on the east side of the Missouri River, a trading post for the Yanktons was located.

3. **Location of Fort Pierre.** Fort Pierre was located on the west bank of the Missouri River, near the mouth of the Bad River, and inside the Sioux-Fort Laramie lands. It was on the periphery of the treaty's boundaries.

4. **Location of Fort Laramie.** Fort Laramie was situated on the Laramie River, approximately one mile upstream from its mouth, and outside the Sioux-Fort Laramie lands. Though on the Laramie River, it was often referred to as being on the North Fork of the Platte River which was only a mile away. During part of the period of time covered by this decision, Fort Laramie was known as Fort John.

5. **Extent of the Upper Platte Indian Agency.** The Upper Platte Agency included lands both inside and outside the Sioux-Fort Laramie area.

6. **Observations of Edward Denig, 1833-1855.** Denig, who spent approximately twenty years in the general area, wrote in 1855-56 of his experience and recollec-

tions covering that period. He included a description of the locations of the various Sioux bands. He did not, however, indicate the exact year or years in which the bands were found in the locations he describes.

Denig placed the Brules on the headwaters of the White River and the Niobrara River, reaching down those rivers to their middle and touching the Badlands and the Bad River on the west and north. [*477/478*]

The Oglalas were said to inhabit the area from Fort Laramie on the Platte River (actually the Laramie River), extending northeast, including the Black Hills, the heads of the Bad River and reaching as low down as the forks of the Cheyenne. Continuing west, according to Denig, they were frequently found near the head of Grand River.

The Minneconjous were to be found from Cherry River on the Cheyenne to the Butte de Mince on the Grand River.

The Hunkpapas, Sans Arcs, and the Blackfeet Sioux were said to occupy similar areas. They could be found along the Moreau, Cannonball, Heart, and Grand Rivers. They seldom extended far up the Grand River but occasionally reached the Little Missouri River.

The Two Kettle Band was said to confine itself to the Moreau and Cheyenne Rivers.

The Yanktons were said to reside in territories east of the Missouri River between the Vermillion River and Fort Pierre, occasionally placing their village on the head and along the James River if game were to be had, but more often were situated on the west side of the Missouri River between the Niobrara River and the White River and at times along these rivers. Denig further remarked that, occasionally, the Yanktons were located at and around Fort Pierre and as far beyond as the Cheyenne River.

Denig placed the Tetons almost entirely within the Sioux-Fort Laramie area. The Yanktons, though found to reside principally in areas outside the Sioux-Fort Laramie lands, were located at certain times within the area. [*478/479*]

Yankton and Teton Locations: 1838-1843

7. **Observations of Colin Campbell, 1838-39.** In a March 14, 1838, letter to P. D. Papin, trader Colin Campbell told him that should he send goods to the south fork of the White River (inside Sioux-Fort Laramie lands), the Yanktons would trade there. On April 28, 1839, Campbell again reported from the forks of the White River that the Yanktons had arrived with plenty of robes. This report did not mention where the Yanktons arrived from.

8. **Sightings by John C. Fremont, 1839-1843.** John Charles Fremont embarked on several journeys through the West, resulting in his frequent contact with various Indian tribes. In June 1839 he was at Fort Pierre, and noted that a large village of Yankton Sioux was on the prairie a few miles away. The location of this prairie was not given. A month later near the Sheyenne River, located east of the Missouri and outside of the Sioux-Fort Laramie lands, Fremont and his party encountered Yankton lodges as well as Yanktonais and Sissetons. This sighting placed Yanktons east of the Missouri and outside the Sioux-Fort Laramie lands. This sighting was not of the entire Yankton sub-tribe.

Fremont recounted that in August 1841, on the waters of the Snake River, the trader Frapp and his men fought the Cheyenne and the Sioux. The Frapp incident had angered the Indians and led to the uniting of 800 lodges of Gros Ventre, Oglalas, and Cheyennes. This group

intended to attack the Shoshones and Crows and a party of about 100 whites in either the Green River Valley (west of the subject tract) or on the Sweetwater River (west of, or the southwest boundary of the Sioux-Fort Laramie lands). According to Fremont, these Indians were to hunt buffalo in the Medicine [*479/480*] Bow Mountains (southwest of the area), cross over to the Green River, and then return to the Laramie by way of the South Pass and the Sweetwater Valley. Fremont subsequently learned that the Indians had in fact overtaken the white party near Rock Independence in the valley of the Sweetwater in the southwest corner of the Sioux-Fort Laramie lands. The whites were led by Thomas "Broken Hand" Fitzpatrick, who convinced the Indians to permit them unmolested passage.

Later, in July 1842 Fremont encountered more Oglala Sioux, who advised Fremont that they were a part of a large village that was on its way home. The village, consisting of Arapahoes, Cheyennes, and Oglalas, had crossed the North Platte below the mouth of the Sweetwater, was now in the Black Hills of Wyoming, and would return to the North Platte by the way of Deer Creek. This occurred southwest of the Sioux-Fort Laramie lands.

On July 3, 1843, while in the valley of the South Fork of the Platte, near the mouth of Bijou Creek, Fremont encountered an Oglala from a nearby village. The Sioux of the village had lost all their animals in the severity of the preceding winter and were now on their way up the Bijou Fork to beg horses from the Arapahoes, who were hunting at the head of the river. These incidents occurred south of the Sioux-Fort Laramie lands.

Finally, on August 5, 1843, Fremont was journeying down the Arkansas River, within twenty miles of

Bent's Fort, when he met a large village of Sioux and Cheyennes, who were returning from the crossing of the Arkansas where they had met the Kiowas and Comanches. This group of Sioux and Cheyennes had massacred fifteen Delawares whom they had discovered in a fort on the Smoky Hill River. These events took place south of the Sioux-Fort Laramie lands. [*480/481*]

9. **Observations of Stephen Riggs, 1840.** Stephen Riggs, a missionary at Lac qui Parle, traveled to Fort Pierre in 1840 in an attempt to establish a mission among the Sioux of the Missouri. He described the locations of the various sub-tribes of the Sioux. He noted that the Yanktons, though still considered to be living east of the Missouri, hunted mostly west of the river. Riggs distinguished between where the Sioux bands "lived" and where these bands "hunted". Regarding the Tetons, Riggs placed them all west of the Missouri and located their hunting grounds as being from the Missouri River to the Black Hills and from the Mandan villages on the north to the Platte River on the south.

The Tetons were broken down into seven distinctive bands and Riggs outlined the range of each. The Brules were said to range chiefly on the heads of White River and as far south and west as the headwaters of the Platte. The Oglalas ranged near the Black Hills of South Dakota and sometimes as far south as the Platte. The Minneconjou's range was generally on the Cheyenne River. Riggs placed the Hunkpapas and Sans Arcs north of the Minneconjou and the Blackfeet along the Grand River. The Two Kettles were said to range north of the Blackfeet.

Riggs' locations of the Teton bands placed them throughout the Sioux-Fort Laramie lands and beyond. From Riggs' description, the overwhelming bulk of the

Tetons were within the Sioux-Fort Laramie lands. From Riggs' discussion it was difficult to determine whether the Yanktons, who reportedly hunted primarily west of the Missouri River, hunted in areas inside or outside the Sioux-Fort Laramie lands.

Riggs' account also dealt with the buffalo hunt. At the outset of his journey from Lac qui Parle, Riggs accompanied a party of Sioux Indians starting out on their buffalo hunt. He stated that the "horses, [*481/482*] women and children, and dogs were all heavily laden with kettles, various articles of clothing, and corn for provisions until they reached the buffalo." Teton Sioux Exhibit No. 106, pp. 330. Thus, it appears that the entire group accompanied the men on such hunts.

10. **Logbook of Joseph LaBarge, 1840.** Joseph LaBarge, the renowned riverboat captain who piloted steamboats up and down the Missouri River, maintained a logbook of his trips. On July 20, 1840, his logbook recounted a meeting with some Yanktons who had their lodges below the Little Cheyenne. The Little Cheyenne River was east of the Missouri River, outside of the Sioux-Fort Laramie lands. The sighting was of only a small group of Yanktons, not the entire sub-tribe.

11. **Observations of Rufus Sage, 1841-1842.** Rufus Sage, the mountain man, spent many months in the area occupied by the Sioux. In 1841, he located the Oglala and Brule bands in the vicinity of Fort Platte which was located on the North Fork of the Platte River, three-fourths of a mile above the mouth of the Laramie River and inside the Sioux-Fort Laramie lands. In describing the boundaries of the Sioux Nation, Sage stated that "the Sioux occupy a territory extending from the St. Peters of the Mississippi to the Missouri and from

there to the forks of the Platte, and up that river to its headwaters." Yankton Sioux Exhibit No. 41, p. 2. Much of the described area, particularly the southwest and eastern portions, was outside the Sioux-Fort Laramie lands.

The following year, on July 4, 1842, Sage saw the Sioux along with other tribes encamped near Beaver Creek, which was south of the South Platte and outside of the Sioux-Fort Laramie lands. His account did not specify which band of Sioux or how many lodges of the 600 to 700 total [*482/483*] lodges were Sioux. Near the end of August of that year, Sage also reported a grand convocation of Indians, including a large number of Sioux, Comanches, Blackfeet, and Arickarees, in the vicinity of Fort Lancaster (South Ford of the Platte River). Sage did not disclose which band of Sioux and how many were involved.

Besides the aforementioned sightings, Sage observed that various Indian tribes were dependent solely upon the chase for subsistence and occupied no fixed residences. According to Sage, these tribes were required to rove from place to place in search of game.

12. **Journal of Theodore Talbot, 1843.** Theodore Talbot, who traveled with John Fremont, also compiled a journal of his expedition. On August 2, 1843, while separated from Fremont, Talbot passed an Oglala village of about 1,500 persons near Horse Creek. This sighting was south of the North Fork of the Platte and outside of the Sioux-Fort Laramie lands. On August 4, 1843, Talbot and others camped near Fort John, which was located one mile upstream on the Laramie River, and outside of the Sioux-Fort Laramie lands. Nearby, several lodges of Brules and Minneconjous were camped. A few days later while traveling along the Sweetwater

River, Talbot encountered a group of Minneconjous. These Indians were allegedly on a war party against the Crows. The Sweetwater River flows through lands outside of the Sioux-Fort Laramie lands as well as forming the southwestern border of the treaty area.

13. **Sightings of Johnson and Winter, 1843.** Two other travelers, Johnson and Winter, mentioned in their narratives their coming upon a Sioux Indian on August 4, 1843. They were able to prevent his escape and [*483/484*] inquired about the whereabouts of his tribe. He informed them that he was from a village of 300 souls camped three miles away.

This Sioux village was located near the headwaters of the Sweetwater River, west of the Sioux-Fort Laramie lands.

Yankton and Teton Locations—1844-1849

14. **Reports of Agent Drips, 1844-1845.** In the late fall of 1844, Agent Andrew Drips of the Upper Missouri Agency reported to the Superintendent of Indian Affairs that four men had arrived from Fort John with the news that two white hunters had been killed by the Sioux on the head of Laramie Fork, which was outside the Sioux-Fort Laramie lands. The Sioux involved in the incident were not further identified by Agent Drips.

In December 1844 the Oglalas received their supplies from Agent Drips at the Oglala camp on the Platte River. Other Oglalas received their supplies that month at the Oglala camp on Horse Creek.[1] The latter camp was outside the Sioux-Fort Laramie lands. It is not clear

[1] The Docket 332-C plaintiffs reported Drips' account as specifying the "Horn Creed"; however, upon close examination we have determined that "Horse Creek" was the correct reading of the report by Drips.

whether the Platte River camp was located inside or outside the Sioux-Fort Laramie area.

The Hunkpapas and Brules received their supplies at their camp at Fort Pierre on October 4, and November 3, 1844, respectively. This occurred within the Sioux-Fort Laramie lands.

In his August 27, 1845, report to Superintendent Harvey, Drips stated that the Sioux of the Upper Missouri Agency were numerous and scattered over a large tract of country. According to Drips, they "lived entirely [*484/485*] upon buffalo, and were found during the winter months principally on the Missouri or its tributaries. The remainder of the year they were on a large tract of country between the Missouri and the Platte in search of subsistence." Yankton Sioux Exhibit No. 45-7, p. 2.

15. **McLeod's Letter—Tetons and Yanktons East of the Missouri River, 1845.** In a letter dated April 12, 1845, a trader in the region east and north of the Missouri reported the arrival of over 600 lodges of Yanktons and Tetons along the northern James River area, with more coming in daily. According to this trader, named Martin McLeod, the Indians brought astounding reports that due to the extreme scarcity of buffalo not one Teton or Yankton remained west of the Missouri. McLeod's letter further mentioned many bands wandering about in a state of starvation all winter.

McLeod's letter stating that all Tetons and Yanktons were east of the Missouri referred only to those Indians normally found at that time along the Missouri and its tributaries. By 1845 many bands of the Sioux were no longer spending their winter along the Missouri but had expanded into areas further to the west. This fact, coupled with the extreme scarcity of buffalo along the

Missouri that winter, caused those bands to avoid the Missouri River and to hunt for buffalo along the North Fork of the Platte.

16. **Report of Agent Hamilton, 1844.** In July of 1844 Agent Joseph Hamilton of the Council Bluffs Agency indicated to his superiors that the country in which Fort John was situated belonged to the Brules and Oglalas who numbered about 600 lodges. This location placed these bands of Tetons in the southwest portion of the Sioux-Fort Laramie lands and in lands located outside of the area. [*485/486*]

17. **Expedition of Colonels Kearny and Cooke, 1845.** Colonel Philip Kearny, who visited the Sioux during the summer of 1845, maintained a journal or logbook of the events occurring during his expedition. On June 9, while continuing up the North Fork of the Platte, he reported seeing large herds of buffalo on both sides of the river. A week later, on June 16, Kearny observed some 250 Oglala and Brule Sioux near Fort Laramie. On his return trip, Kearny encountered 73 lodges of Oglalas on the south bank of the North Fork of the Platte.

On June 15, 1845, Colonel Philip Cooke, who accompanied Colonel Kearny and kept an account of his own experiences, met with 1,200 Sioux at the confluence of the North Fork of the Platte and the Laramie River. These sightings were outside of the Sioux-Fort Laramie lands.

18. **The Journal of Joel Palmer,[2] 1845.** Joel Palmer also visited the region around Fort Laramie during the

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[2] Reben Gold Thwaites, Palmer's editor, noted that the usual habitat of the Sioux was along the Missouri River or eastward. According to Thwaites, the Teton Sioux were in the habit of wandering westward for summer hunts. Thwaites, as did Riggs, distinguished areas where Sioux lived and where they hunted.

summer of 1845. Palmer's journal of travel over the Rocky Mountains reported a June 25, 1845, sighting of Sioux at Fort Laramie. Palmer estimated the number of Sioux living in this region at close to 1,500 lodges. This included more than just one band of Sioux. This report included Oglalas, Brules, and smaller amounts of other Teton bands and, perhaps, even some Cheyenne.

19. **Trading Report of A. R. Bouis, 1845.** In late August 1845, trader A. R. Bouis reported to his superiors on the locations of the tribes and the prospects for the coming trading season. He wrote that he expected [*486/487*] a good winter season since at the time of his writing buffalo were plentiful in the Fort Platte area. He indicated that part of the Minneconjous were presently at Bear Butte (inside the Sioux-Fort Laramie lands) while the rest had left for the Platte. The Hunkpapas along with some Blackfeet Sioux were said presently to be at Three Buttes (location unknown). The Sans Arcs[3] were on the White River with a band of Brules. A group of Yanktons was at the James River, and another group of Yanktons was at their cornfield. Bouis did not indicate the location of the cornfield. The Yanktons had such fields both east and west of the Missouri River.

From Bouis's report it is found that in late August 1845 virtually all the Yanktons reported were east of the Missouri and virtually all the Tetons reported were west of the Missouri, with a majority of the reported bands being within the Sioux-Fort Laramie lands.

20. **Sightings of Edwin Bryant, 1846.** Edwin Bryant, a journeyer through the West between 1846 and 1847,

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[3] Both parties cited this band as being "Sawons". Our examination of the script copy of Bouis' report in Yankton exhibit 45-8 clearly indicates that he was referring to the Sans Arcs.

recorded his experiences. On June 23, 1846, he reached Fort Lararmie, where he reported over 3,000 Sioux Indians encamped on the plain surrounding the fort. This was outside of the Sioux-Fort Laramie lands. According to Bryant, the Sioux had collected there for the purpose of organizing a war party against the Shoshone and Crows. Bryant further disclosed that, in traveling with their women and children, the Sioux could cover 50 to 60 miles per day. [*487/488*]

On June 24, 1846, Bryant observed that the Sioux had broken camp and had conducted their women and children to a point on the Platte about 50 miles above Fort Laramie (within the Sioux-Fort Laramie lands), where the warriors left them in the care of the old men until the war party returned. The old men, women, and children stayed behind.

21. **The Journals of Francis Parkman, 1846.** Francis Parkman, the famous historian, maintained a journal of his western travels. Often, he spent time living with the various tribes he encountered. The editor of his journals noted that Parkman spent a few weeks in the summer of 1846 hunting with a Sioux village beyond the Laramie Mountains in the Laramie Basin, and in the eastern foothills of the Medicine Bow Mountains (southwest of the Sioux-Fort Laramie lands).

On June 14, 1846, Parkman and his party forded Horse Creek (south of the Sioux-Fort Laramie lands) and sighted 20 lodges of Oglalas under Chief Smoke on the banks of the creek. A week later Parkman camped with the Oglala Chief, Man Afraid of Horses, at the mouth of the Chugwater (south of the Sioux-Fort Laramie lands. Parkman mentioned that the Sioux were massing for a large war party. The Minneconjous were expected on June 29, 1846. Oglalas under Chief Smoke

were hunting across the Platte. Tunica, another Oglala chieftain, arrived and Parkman learned it was Tunica's intention to hunt in the vincinty of the Laramie Mountains and then go to war.

On July, 15, 1846, Parkman headed south towards the headwaters of Laramie Creek (south of the Sioux-Fort Laramie lands). That night he reached the village of Big Crow, an Oglala. Parkman hunted with this village and moved with it up the Laramie Creek towards the eastern foothills of the Medicine Bow Mountains. [*488/489*]

According to Parkman's journal, the Sioux hunted in bands and while hunting never really maintained a permanent site.

22. **Report of Agent Moore, 1846.** T. P. Moore succeeded Andrew Drips as agent for the Upper Missouri Agency. In his report of September 21, 1846, he indicated that the Yanktons were to recieve their annuities at Fort Lookout or Campbell's trading house. Moore referred to Fort Lookout as being the headquarters of the Yankton and Santee bands of Sioux. Late in June, 1846, Agent Moore met a large number of Tetons at Fort Pierre. Members from the Brule Band were recognized as among them. Around July 19, 1846, Moore recieved notice from the Platte area that all the chiefs and braves of the Oglalas were on a war party against the Crows and would not be present if he decided to visit them. On August 23, 1846, 400 lodges of Yanktons were at Fort Lookout to receive their goods. This accounted for most of the Yanktons.

23. **Report of Agent Fitzpatrick, 1847-1848.** In 1847 Thomas "Broken Hand" Fitzpatrick was appointed agent for the Upper Platte Agency. In a letter to Fort

Leavenworth dated January 17, 1847, Fitzpatrick reported that the Sioux were fast leaving the Missouri and moving back towards the Platte and Arkansas Rivers, where game was more abundant, and that the Sioux would in a few years abandon the Missouri River altogether. A year later, in February of 1848, he found Sioux along the South Fork of the Platte for 80 miles and for 20 miles down Lodgepole Creek, a tributary of the South Fork.

Fitzpatrick did not indicate which Sioux bands were located in the area, nor did he hint that these Sioux were bands normally found along the Missouri. Whichever bands were in this area, they were outside of the Sioux-Fort Laramie lands. [*489/490*]

24. **Sightings of Father Ravoux, 1847.** Father Augustin Ravoux journeyed across the prairies adjacent to the Missouri River and the Vermillion River and reached Fort Pierre in late July of 1847. There he found large numbers of Hunkpapas, Brules, and Blackfeet Sioux encamped in the surrounding vicinity. This sighting placed these designated groups within the Sioux-Fort Laramie lands.

25. **Yankton Attack Upon the Steamboat "Martha", 1848.** In a report on June 16, 1848, Agent G. C. Matlock wrote to Supertintendnet Thomas Harvey of the attack by Yanktons upon the Steamboat "Martha". The attack occured on June 13, 1848, shortly after the Martha landed at the Yankton trading post just north of Crow Creek. This incident occcurred east of the Sioux-Fort Laramie lands although in the vicinity of Fort Lookout.

The Yanktons had collected at the post to receive treaty goods from the Government. The record does not indicate where these Yanktons came from, or how long they remained in the Fort Lookout area.

26. **The Travels of Father DeSmet, 1846-1848.** Father Pierre-Jean DeSmet traveled throughout much of the Upper Missouri region during the mid-19th century. In 1846, Father DeSmet passed the mouth of the Niobrara River, which he reported rose at the foot of the Black Hills. At the time, it was the common belief that this was indeed the location of the headwaters of the Niobrara River. Two years later, in discussing the Bad Lands, DeSmet stated that this area gave rise to the Bad River, the White River, and the Niobrara River.

In a December 1848 letter to Superintendent Harvey, DeSmet disclosed that he had received reports from Indians, whites, and half-breeds telling of the hastening disappearance from the region of the buffalo, moose, and [*490/491*] elk. According to DeSmet, the Yanktons and Santees, who had sold and left the Des Moines and Sioux Rivers area, were trespassing on the hunting ground of the Brules, for he had encountered them in October 1848 at the headwaters of the Niobrara River and the White River. This was inside the Sioux-Fort Laramie lands.[4]

27. **Observations of Cross and Gibbs, 1849.** Osborne Cross and George Gibbs were part of the first United States Military Expedition to travel the full length of the Oregon Trail from Fort Leavenworth to Fort Vancouver between May and October 1849. They reported, on June 11, 1849, meeting a party of Brules headed by Bull-Tail near the South Fork of the Platte. Gibbs estimated that this group contained 150 lodges. This was a war party which was returning from its encounters. This war party's activities were outside of the Sioux-Fort Laramie lands.

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[4]DeSmet placed these Indians in the *hunting* grounds of the Brules. Other travelers and government agents made similar distinctions between where the Indians lived and where they hunted.

28. **Report by Agent Hatton, 1849.** In his October 1849 report, subagent William Hatton noted that in June 1849 he went up-river to deliver the Yankton and Santee annuities. He stopped first at Fort Vermillion (east of the Sioux-Fort Laramie lands) but, finding only 20 lodges there, did not distribute the annuities. When Hatton arrived at Fort Lookout, which he described as situated at the Yankton village, he deposited his goods, not being able to distribute them since the Yanktons were on their hunting grounds. Hatton's report did not indicate where the Yankton hunting grounds were. [*491/492*]

29. **Observations of David DeWolf, 1849.** David DeWolf traveled through the Platte River area and while camped on the south bank of the North Fork of the Platte River on June 24, 1849, his group was visited by approximately 60 Sioux Indians. Two days later they met another group of Sioux approximated at 40 in number.

The location of DeWolf's camp was just outside the Sioux-Fort Laramie lands. DeWolf did not identify which band of Sioux he saw.

30. **Diary of James Pritchard, 1849.** James Pritchard, who traveled through the Platte River area, maintained a diary of his activities. On June 26, 1849, his diary disclosed that he was on the South Fork of the Platte River near where a village of 2,000 to 3,000 Sioux Indians were located. This was outside of the Sioux-Fort Laramie lands. Pritchard's diary did not specify which band of Sioux he saw.

31. **Sightings by Howard Stansbury, 1849.** On July 5, 1849, in the vicinity of the North Fork of the Platte River, Howard Stansbury of the Corps of Topographical Engineers encountered 10 lodges of Sioux that were

driven by cholera from the South Fork of the Platte River to the emigrant road on the North Fork in the hope of obtaining medical aid from non-Indians. The following day, Stansbury paid a visit to another cholera-stricken village of 250 Indians that was camped further upstream along the North Fork of the Platte River. On September 27, 1849, while returning from his surveying assignment, Stansbury encountered on the Laramie River (outside of the Sioux-Fort Laramie lands) several hundred Oglalas led by Chief Buffalo Dung. His village consisted of nearly 100 lodges. Traveling the following day in a southeasterly direction from the Oglala village, Stansbury and his party observed 50 Indians involved in a buffalo hunt. Stansbury did not identify these Indians. [*492/493*]

Stansbury's sightings placed some of the Oglalas clearly outside of the Sioux-Fort Laramie lands, although they were not far removed from its borders. Other sightings placed Indians on the North Fork of the Platte without distinguishing whether it was on the north or south bank. These sightings could have placed the Indians either in or out of the Sioux-Fort Laramie lands, but clearly placed them along its periphery.

32. **Report by Governor Ramsey, 1849.** Alexander Ramsey, Territorial Governor for the Minnesota Territory, included in his October 1849 report a description of the various habitats of the Sioux Nation. As to the Tetons, he reported they lived entirely beyond the Mississippi (actually meaning the Missouri) River, along it and the Bad River. Their territory, according to Ramsey, extended above the Cannonball River and south to the Niobrara River.

As to the Yanktons, Ramsey placed them "next beyond that of the Sissetons—commencing on the

western side of Lake Traverse and extending west of the James River to the Missouri, above old Fort Lookout and to the lands of their scions, the [Yanktonais]." Yankton Sioux Exhibit 49-7.

Ramsey located the Tetons almost entirely within the Sioux-Fort Laramie lands. The Yankton territory he described was nearly all outside of the Sioux-Fort Laramie lands.

Yankton and Teton Locations: 1850-1854

33. **Journal of Thaddeus Culbertson, 1850.** Thaddeus Culbertson visited the Upper Missouri region in 1850 and kept an account of his travels, later published as a journal. In his journal, Culbertson noted, on April 12, 1850, about 25 Yankton lodges at the Vermillion post (east of the Sioux-Fort Laramie lands). None of the Indians were presently there but rather were out chasing buffalo. In early May, Culbertson arrived at the [*493/494*] Yankton Trading House which was located north of Crow Creek, east of the Sioux-Fort Laramie lands. Culbertson encountered Indians, presumably Yanktons, upon his arrival at the trading establishment.

Culbertson's journal also contained a chart depicting a tabular view of the Sioux Nation of the Upper Missouri as of 1850. This chart placed the Yanktons in the basin of the James River. It placed all the Tetons except for the Oglalas within the Sioux-Fort Laramie lands. The Oglalas were said to be at the North and South Forks of the Platte River and west of the Black Hills.

The chart also described the various sub-tribes' and bands' "country", not necessarily including where they hunted. Nonetheless, according to the chart, all the Yanktons were outside the Sioux-Fort Laramie lands

while all the Tetons, save the Oglalas, were inside of the area.

34. **Sightings by Bennett and Lampton, 1850.** James Bennett, whose party left New Harmony in 1850 and crossed the plains, maintained a journal comprised of his daily activities and observations. On April 18, 1850, he spotted a group of Sioux Indians, approximately 20 in number, on the South Fork of the Platte River.

William Lampton's diary of his travels during his overland journey revealed a sighting of about 125 Sioux warriors in the vicinity of Ash Hollow Creek. This sighting occurred on June 6, 1850.

Both Bennett's account and Lampton's account placed these Sioux Indians in areas outside of the Sioux-Fort Laramie lands. Lampton's sighting at Ash Hollow Creek was adjacent to the North Fork of the Platte River, just barely south of the Sioux-Fort Laramie area. Neither observer identified the sub-tribe or band of the Indians they encountered. [*494/495*]

35. **The Fort Laramie Treaty Council, 1851.** The Fort Laramie Treaty Council took place in September of 1851. *The Republican,* a St. Louis newspaper, dispatched its editor to Fort Laramie to cover events surrounding the treaty. Various Indians from several of the gathered tribes spoke expressing their feelings about the treaty's effect. One Oglala Indian objected to the North Fork of the Platte being designated the boundary between the Sioux and the Cheyennes and Arapahoes. The Indian asserted that his band hunted from the Platte to the Arkansas River and from there to Red Butte and the Sweetwater. This area was outside of the Sioux-Fort Laramie lands.

36. **Reports of Governor Ramsey, 1852.** On October 26, 1852, Territorial Governor Alexander Ramsey

indicated in his report the tribes of Indians known during the year to inhabit lands in the Territory of Minnesota, which extended from the Missouri River eastward. Ramsey included Teton, Yankton, and Yanktonai Sioux as some of the tribes found there. However, Ramsey did not disclose which bands of the tribes were found there nor the times of the year when they were known to inhabit the territory.

37. **Report of Agent Norwood, 1852.** In his report of September 16, 1852, James Norwood, the agent for the Upper Missouri Agency, noted his awareness of the disorderly conduct of a band of about 60 Santees, with some Yanktons in amongst them, who inhabited the waters of the Big and Little Sioux Rivers. This area was east of the Sioux-Fort Laramie lands.

38. **Table of D. D. Mitchell, 1852.** In 1852, Superintendent D. D. Mitchell composed a table of the Upper Missouri tribes for that year. He placed the Yanktons near the Vermillion River. The lower band of Tetons, [*495/496*] predominantly Brules, was placed south of the Missouri, as was the Oglala band. The "Siounes" were placed on the Cheyenne River and the Platte River.

Mitchell's table placed the Yanktons completely outside of the Sioux-Fort Laramie lands, while the Tetons were placed mainly within the area.

39. **Letter of Lieutenant Garnett, 1853.** In a letter, dated June 30, 1853, from U.S. Army headquarters at Fort Laramie, Lieutenant R. B. Garnett reported to his superiors an encounter involving his troops and a band of Minneconjous who, according to the officer, had been rambling about the Platte country for the past two years. The encounter occurred on June 15, 1853. The Minneconjou village consisted of approximately 80 to

100 lodges. The Platte country included areas both inside and outside of the Sioux-Fort Laramie lands.

40. **Report of Agent Vaughan, 1853.** In his September 20, 1853, report to Superintendent Alfred Cumming, Agent Alfred Vaughan of the Upper Missouri Agency indicated the various Indians within his agency and where they lived. He placed the Indians at the following locations:

The Brules were said to occupy the country from the mouth of the South Fork of the White River, south down to the Niobrara River at approximately 100 miles from its mouth, from there to its headwaters taking all the country lying between the White River and the Niobrara River.

The Yanktons were found from the mouth of the White River up to Fort Pierre, both east and west of the Missouri, some 125 miles in length, and as far east as the James River.

The Two Kettles were said to be on the Bad River, from its mouth to its source, and north as far as the Cheyenne River. [*496/497*]

The Hunkpapas and Blackfeet Sioux were found from the mouth of the Moreau River as high up the Missouri as the Cannonball River and southwest for 150 to 200 miles.

Finally, the Sans Arcs and the Minneconjous were in lands lying north of the Cheyenne River as far as the Moreau River, then southwest, south of the Black Hills and as far as the mouth of Beaver Creek (South Dakota Black Hills).

Vaughan also noted that the extreme severity of the weather during the winter of 1852-53 prevented these

Indians from leaving their homes in quest of buffalo, their range being a long distance off.

Vaughan did not include the Oglalas in his report because they were assigned to the Upper Platte Agency. The Teton bands which Vaughan reported on were found predominantly within the Sioux-Fort Laramie lands.

41. **Observations of Lieutenant Saxton, 1853.** Lieutenant R. Saxton led an expedition into the area in 1853. In his report, Saxton noted that on October 18, 1853, the Yanktons, 2,500 of them, had left Fort Pierre for buffalo country. He mentioned that the Indians had come to Fort Pierre in order to receive their supplies from the Government. Saxton failed to mention where the Yankton buffalo country was.

42. **Report of Agent Vaughan, 1854.** In a report on March 6, 1854, Agent Vaughan stated that a war party of approximately 60 Hunkpapas and Blackfeet Sioux were in the vicinity of Fort Union. This sighting placed these warriors north of the Sioux-Fort Laramie lands. However, Vaughan's report did not indicate where the old men, women and children were located during the war party, nor did it indicate the length of time spent by these Indians in the Fort Union area. [*497/498*]

43. **Grattan's Massacre, 1854.** In August 1854, there occurred the incident commonly known as "Grattan's massacre." It began with the killing by a Teton Sioux of an emigrant's cow which had fallen behind the rest of the group. The emigrant train was traveling along the south bank of the North Fork of the Platte River when the incident occurred. The killing of the cow was reported to the army and a group of soldiers under the command of Lieutenant John L. Grattan was sent to the Indian village to apprehend the wrongdoer. The killer of the cow was of the Minneconjou band, although the

village was comprised largely of Oglalas and Brules. When the offender refused to surrender himself, Lieutenant Grattan ordered his men to fire upon the Indians. At first the Indians did not return the fire, but when Grattan's men fired their cannon at them, the Indians rushed the soldiers and quickly killed every soldier in Lieutenant Grattan's command.

44. **Military Activity in Response to Grattan's Massacre, The Reports of General Winship and Colonel Hoffman, 1854.** After Grattan's Massacre there was an increase in the presence of the military in the Fort Laramie area. The Army was sent into the area to gain information on the various bands of Sioux in order to conduct operations against those Indians believed to be responsible for the death of Lieutenant Grattan and his men.

In a report compiled on September 27, 1854, General O. F. Winship discussed the various bands of Sioux who habitually resided south of the Missouri. In the report, the Oglalas were said to occupy the North Fork of the Platte River. The Brules inhabited the country bordering the White River, while the Minneconjous were said to be found on the two forks of the Cheyenne. The Blackfeet Sioux were located on the Missouri at the [*498/499*] mouth of the Moreau River, not far above Fort Pierre. The Hunkpapas were placed in areas similar to the Blackfeet Sioux, while the Sans Arcs were placed on the headwaters of the Moreau River. The Yanktons were not mentioned. The bulk of the Teton locations was within the Sioux-Fort Laramie lands.

Colonel William Hoffman, pursuant to instructions, reported on November 27, 1854, on the various bands of Sioux and their relation to the country occupied by them. According to Hoffman, the Oglalas occupied the

country from the headwaters of the Powder River, south to the South Fork of the Platte River, and between the two forks of the Platte River. They generally wintered on the Powder River or between it and the Platte River.

The Brules' country was reported to extend from the sources of the White River south across the Niobrara River to the Platte River, and as far east as the forks of the Platte River.

The Minneconjous, Hunkpapas, Blackfeet Sioux, and the Sans Arcs were said to occupy the country from the Missouri west to the sources of the two forks of the Cheyenne in the Black Hills (South Dakota), and from the Moreau River south to the White River. No mention was made of the Yankton Sioux.

According to Colonel Hoffman's report, the Minneconjous, Hunkpapas, Blackfeet Sioux, and the Sans Arcs were occupying areas completely within the Sioux-Fort Laramie lands. The Brules' country was predominately within the area, with a portion being outside of the Sioux-Fort Laramie lands. As to the Oglalas, the predominate portion of their country was outside of the Sioux-Fort Laramie lands with a small portion still within the area. [*499/500*]

Yankton and Teton Locations: 1855-1858

45. **Report of Colonel Hoffman and Lieutenant Heth, 1855.** On January 1, 1855, Colonel William Hoffman reported that Red Plume and his Oglala village of 35 lodges were camped 15 miles up the Laramie River from Fort Laramie. The main village of Oglalas was still north of the North Fork of the Platte River (inside Sioux-Fort Laramie lands). The 35 lodges were later reported by Colonel Hoffman to have moved to the headwaters

of Horse Creek (outside Sioux-Fort Laramie lands). Hoffman noted, however, that the report came from an Indian and may have been untrue.

An order existed at the time forbidding the Indians access to lands south of the North Fork of the Platte River. According to Hoffman, on January 2, three Oglala chiefs requested permission to hunt south of the Platte River. Four days later on January 6, 1855, three other Oglala chieftains, desiring to venture south for buffalo, complained that their fathers hunted there and that their hearts naturally turned there.

In a report to General O. F. Winship of January 24, 1855, Lieutenant Henry Heath cited a recent incident between some whites and some Oglalas near Fort Kearny to the southeast of the area. Lieutenant Heth also mentioned that back in September of 1854 a group of Yanktons stole some horses from the same post. Additionally, Heth remarked that members from Brule and Minneconjou bands were known to have participated in the massacre of Lieutenant Grattan and his men.

46. **Trading Report of Charles Galpin, 1855.** In a February 17, 1855, dispatch to Pierre Chouteau, Jr., trader Charles Galpin discussed the coming trading season. He reported that Teton groups representing all bands except the Brules were on the Little Missouri River. The Little [*500/501*] Missouri River travels through areas both inside and outside of the area. Galpin did not specify where on the Little Missouri these Indians were, nor did he indicate the numbers of each band that were present.

47. **Report of Agent Vaughan, 1855.** In a February 17, 1855, letter to Superintendent Cumming, Agent Alfred Vaughan reported that he had learned of a war

party of 300 Blackfeet and Hunkpapa Sioux attacking the Assiniboines in the vicinity of Fort Union. This war party was operating to the north of the Sioux-Fort Laramie area.

48. **Report of Colonel Hoffman, 1855.** In a February 21, 1855, report from Colonel William Hoffman to General O. F. Winship, the Colonel disclosed that a group of Brules was presently on the White River having recently returned from Fort Laramie where they had returned horses stolen by some members of their band.

49. **Reports of Superintendent Cumming and Agent Vaughan, 1855.** In a report to Commissioner of Indian Affairs George Manypenny, Superintendent Alfred Cumming disclosed that, in April 1855, he had received a report from traders regarding their being attacked in the vicinity of the Yellowstone River (northwest of the Sioux-Fort Laramie lands) by a Hunkpapa war party. The number of Hunkpapas in this war party was not disclosed.

In his report dated June 27, 1855, Superintendent Cumming reported that Agent Vaughan had distributed annuities to the Yanktons at their village on the east bank of the Missouri, 55 miles above the mouth of the Niobrara River (this village was to the east of the Sioux-Fort Laramie lands). The Yanktons were said to be cultivating corn, but Agent Vaughan noted that more than half of their number was on the Niobrara River smoking and drying meat and would return to the village as soon as they [*501/502*] had enough to sustain them for the summer. The report did not indicate the place on the Niobrara River where these Indians were located.

In Agent Vaughan's September 12, 1855, report he indicated what had been occurring in May and the summer of that year. In early May, the Hunkpapas and

Blackfeet Sioux had attacked a group of traders between Fort Union and the Crow country, north of the subject area. He noted that on June 22 he arrived at the principal village of the Yanktons, 35 miles above the Niobrara River on the northeast side of the Missouri River (east of the Sioux-Fort Laramie lands). According to Vaughan, this was their permanent summer residence and the Indians there were raising corn, beans, pumpkins, and other crops at the time. He also reported that on August 23 a group of hunters was attacked on the Yellowstone River, northwest of the area, by Sioux Indians, believed to be Sans Arcs and Minneconjous. Finally, he mentioned that at the time of his report the Missouri Brules were believed to be somewhere in the vicinity of the Platte.

According to Vaughan's report, and Cumming's report, the Yanktons were outside of the Sioux-Fort Laramie area. The various bands of Tetons on war parties were also outside of the area.

50. **Communication from General Scott to General Harney, 1855.** In an August 17, 1855, report to General Thomas S. Harney, who was sent to punish the Sioux for the Grattan massacre and for other depredations along the Oregon Trail in Nebraska and Wyoming, General Winfield Scott noted that the Oglala band of Sioux occupied the country to the west and southwest of Fort Laramie. This placed the Oglalas in areas outside of the Sioux-Fort Laramie lands. [*502/503*]

51. **Actions by Agent Twiss in Response to the Presence of General Harney.** Agent Thomas Twiss of the Upper Platte Agency was aware of General Harney's task and attempted to segregate the innocent bands of Sioux from those having had a hand in either Grattan's massacre or other depredations. In August of 1855,

Twiss met with those bands of Brules and Oglalas whom he learned from whites, Indians, traders, and others had nothing to do with the recent hostilities. He informed these bands that the North Fork of the Platte River was to be the boundary between the friendly and hostile Sioux. The hostile Indians were forbidden to cross to the south side of the North Fork. Twiss made it clear that it was up to these Indians to keep the hostile ones away. Twiss placed one group of Brules on Cherry Creek and another group on the Laramie River, some 35 miles above Fort Laramie. A group of Oglalas that had come from the headwaters of the Niobrara River (inside the Sioux-Fort Laramie lands) was placed on the Laramie River, some 25 miles above Fort Laramie. All were now outside of the Sioux-Fort Laramie lands.

52. **Journal of Lieutenant Warren, 1855.** Lieutenant G. K. Warren, a topographical engineer, accompanied General Harney on his expedition of 1855-56. Part of Warren's tasks included maintaining a journal of the routes passed and observations encountered.

On August 7, 1855, Lieutenant Warren recorded his encounter with a band of Yanktons on the east bank of the Missouri, 40 to 50 miles above the Niobrara River. According to Warren, the Hunkpapas, Minneconjous, Sans Arcs, and Blackfeet Sioux were dispersed along the North Fork of the Cheyenne River and Powder River and on the headwaters of the Little Missouri River. (These Indians were not a part of the Upper Platte Agency [*503/504*] and were not included in Agent Twiss' restriction regarding the North Fork of the Platte River.) The Yanktons sighted by Lieutenant Warren were outside of the area, whereas the Teton bands mentioned were within the area.

Also, in the report, Lieutenant Warren stated that in the summer "the Sioux generally followed the buffaloes in their ranges over the prairie, and in the winter fixed their lodges in the cluster or fringes of woods along the banks of lakes and streams." Yankton Sioux Exhibit No. 56-4.

53. **Report of F. V. Hayden, 1855.** F. V. Hayden, accompanying Lieutenant Warren during the expedition of 1855, was assigned the task of taking notes on the geological and physical features of the region of the upper Missouri River. Reporting on the White River valley (inside the Sioux-Fort Laramie lands) Hayden disclosed that this area was considered by the Indians one of their choice spots. According to Hayden, when the Indians were supplied with an abundance of meat, they would resort there and spend much of their time cultivating the area. He also remarked that the Brules and Yanktons were said to do quite well there.

54. **Military Activities of General Harney, 1855.** On September 2, 1855, General Thomas Harney found a large encampment of Brules on Blue Water Creek, a stream flowing into the North Fork of the Platte River from areas within the Sioux-Fort Laramie lands. These Brules were led by Little Thunder. On the following morning, in the valley of Blue Water Creek, Harney's command attacked the Brule encampment inflicting heavy losses upon the Indians. This battle was known as the Battle of Blue Water Creek or the Ash Hollow Massacre. It took place entirely within the Sioux-Fort Laramie lands. [*504/505*]

A few days later, General Harney and his men were camped along the Platte River when they learned that there were 300 lodges of Oglalas and Brules on the Laramie River (outside the Sioux-Fort Laramie lands).

These Indians were the bands assembled there by Agent Twiss. These Indians assured General Harney that they were not involved in the Grattan massacre. The head chiefs of the Oglalas and Brules met with General Harney who ordered them to remain south of the North Fork of the Platte.

55. **Report of General Harney, 1855.** In a November 10, 1855, letter written from Fort Pierre, General Thomas S. Harney identified the Sioux bands and their country. Harney reported the Yankton country to be on the east bank of the Missouri River, between Fort Pierre and the Big Sioux River. The country of the lower band of Brules' was said to be in the vicinity of the White River and the Niobrara River, beyond the Black Hills, and just below the forks of the Little Missouri River, approximately 300 miles above Fort Pierre. The Brules of the Platte were said to have their country on the Platte River, near Fort Laramie but were then on the Little Missouri River. The Minneconjous' country was reported to be around the White River, the Cheyenne River, the Black Hills, and the Little Missouri River, while the Sans Arcs were said to be along the Cheyenne, the Moreau, and the Cannonball Rivers. The Hunkpapas and the Blackfeet Sioux were placed along the Grand, the Moreau, and the Cannonball Rivers, and the Two Kettle Band was said to spend much of its time around Fort Pierre but at other times would be along the Little Missouri River. Finally, the Oglala country was reported to be around Laramie and Horse Creek and out to the Rocky Mountains, but the Oglalas at the time of the report were at the headwaters of the Laramie River and Medicine Bow River. [*505/506*]

Harney's report place almost all of the territory of the various bands, save the Oglalas, within the Sioux-

Fort Laramie area. Most of the designations of the Little Missouri River were to areas within the Sioux-Fort Laramie lands. The Oglalas, however, were placed completely outside of the area. The Yanktons were also totally excluded from the area.

56. **Report of Lieutenant Warren, 1856.** In Lieutenant G. K. Warren's official report of his 1855 journey, compiled in March 1856, he also described the various locations of the Missouri Sioux. The Yanktons were said to be found at the mouth of the Big Sioux River, between it and the James River, and also on the opposite bank of the Missouri River. This description placed the Yanktons entirely outside of the Sioux-Fort Laramie area.

Warren also described the country of the Tetons and the areas of the individual bands. The Tetons were reported to live on the west side of the Missouri River, ranging in an area encompassing the Black Hills and lands between the forks of the Platte River and the Yellowstone River. This description included some area outside of the Sioux-Fort Laramie area. However, the bulk of the range of the Teton sub-tribe was within the area.

As for the individual bands, their ranges were placed at the following locations: The Hunkpapas and the Blackfeet Sioux were found to live on the Missouri River near the mouth of the Moreau River and to roam from the Cheyenne River up to the Yellowstone River and west to the Black Hills. The Minneconjous and Sans Arcs were reported by Warren to live on and between the forks of the Cheyenne and in the Black Hills. The Brules were said to claim the country along the White River and the lands contiguous to the river. The Oglala band was reported to live between the forks of the Platte River.

Finally, the Two Kettle band was said to be scattered among several of the other bands. [*506/507*]

Though Warren's report differed from Harney's, both placed the various Teton bands, except for the Oglalas, throughout the Sioux-Fort Laramie area. Both reports placed Oglala country outside of the area, though still quite close to its boundaries. According to both, the Yanktons were also found to occupy lands outside of the area.

57. **Communications by Agent Twiss, 1855.** In a December 15, 1855, report to Superintendent Alfred Cumming, Agent Thomas Twiss of the Upper Platte Agency included some 650 lodges of Oglalas and Brules in his census of the tribes making up his agency. These bands of Sioux conducted much of their activity in the Platte country. Often, their activities would take them outside of the Sioux-Fort Laramie area. However, they still managed to carry on activities within the subject area.

In a December 25, 1855, letter, Agent Twiss located some Oglalas at Deer Creek (south of the area) but most of them were said to be on the headwaters of the South Fork of the Cheyenne River (within the area). Additionally, Twiss noted that lower down the Cheyenne River, and near the White River, there were three villages of Brules, one on the Niobrara and two on Rawhide Creek. All were within the Sioux-Fort Laramie area.

58. **Observations of General Harney, 1856.** In a January 1856 letter from General Thomas S. Harney's expedition (see finding No. 51, *supra*) to Colonel S. Cooper, Adjutant-General of the United States Army, the corresponding officer reported General Harney's observations on the country in the vicinity of the Niobrara River and Ponca Island. The officer wrote that

the area around the Big Sioux River, east of the Sioux-Fort Laramie area, was a favorite winter rendezvous of the Yanktons, Poncas, and the Santees. The officer also added that during the winter of 1855-56, he had sighted numerous lodges in this region. [*507/508*]

This group mentioned by Harney in his report to Colonel Cooper was predominately that of the Yankton-Santee band known to be inhabiting areas outside of the Sioux-Fort Laramie area.

59. **Sightings by Colonel William Hoffman, 1856.** Colonel William Hoffman (see finding No. 45, *supra*) noted in a February 1856 report that Bad Wound and his Oglala village were camped at Deer Creek during the winter of 1855-56. This was south of the Sioux-Fort Laramie lands.

60. **Report of Agent Vaughan, 1856.** Agent Alfred Vaughan, in his September 10, 1856, report, mentioned his meeting with the Yanktons just below Fort Lookout. They had gathered there anticipating the arrival of their annuities. They were in poor condition and Vaughan attributed it to the scarcity of game in their country. For the greater portion of the year, according to Vaughan, they subsisted almost entirely upon various roots, corn, pumpkins, and beans. Vaughan further added that these Indians now saw the necessity of permanently locating themselves and cultivating the soil.

61. **Report of Agent Twiss, 1856.** In Agent Thomas Twiss' September 22, 1856, report, he presented a census of his agency. Both Oglalas and Brules were included. Twiss also stated that due to General Harney's expedition, the Oglalas and Brules agreed to their beginning agricultural pursuits at farms and trading posts established in the area. Twiss proposed the establishment of

various farms and trading posts in areas both inside and outside of the Sioux-Fort Laramie lands. Some of these posts and farms were already in existence. [*508/509*]

62. **Report of Superintendent Cumming, 1856.** Superintendent Alfred Cumming noted in his September 25, 1856, report that the country on the north side of the Missouri River from the region of the Gros Ventres to to the mouth of the Big Sioux River was claimed by the Yanktonais and Yanktons. Additionally, he concluded that the Yanktons realized the necessity of relying to a greater extent upon cultivation, and that agriculture, in a short time, would be their only source of food. As to the Tetons, Superintendent Cumming said that the Hunkpapas, Sans Arcs, Two Kettles, and Blackfeet Sioux resided on the south side of the Missouri River. The Brules, Minneconjous, and Oglala bands were said to occasionally penetrate that region from the country adjacent to the Platte River. These conclusions were reiterated by Commissioner of Indian Affairs George Manypenny in his November 22, 1856, report.

These reports placed the Yanktons outside of the Sioux-Fort Laramie lands. The Sioux-Fort Laramie area was said to be occupied by Teton bands, even though some of them may have conducted some of their activities outside of the area. The Oglala band was still ranging into lands well outside of the area. Agent Twiss reported that the Pawnees had stolen some horses from an Oglala band camped on the Republican Fork of the Kansas River.

63. **Observations of Samuel McElderry, 1857.** Trader Samuel McElderry wrote from Fort Berthold to Pierre Chouteau, Jr., mentioning that he had not seen any Sioux during the winter of 1856 but had received a visit from some Hunkpapas and Blackfeet Sioux in the fall

of 1856. Fort Berthold was to the north of the area. The report failed to mention how long the [*509/510*] Indians were there, how many there were, where they came from, and where they went upon departing from the vicinity of the fort.

64. **Report of Agent Redfield, 1857.** A. H. Redfield, agent for the Upper Missouri at Fort Union, reported to Superintendent Haverty (successor to Cumming) on September 9, 1857, that on June 13 he reached the mouth of the Big Sioux River and on June 14 found 100 lodges of Yanktons on the south bank of the Missouri (still outside the area). They were engaged in cultivating corn. Their principal village headed by The Man Struck by the Rees was reached the next day. This, too, was on the south bank of the Missouri River and outside of the area. On June 18, 1857, Redfield arrived at Fort Randall (on the west bank of the Missouri but east of the area) and found another 20 lodges of Yanktons. On June 21, 1857, he arrived near Fort Lookout where another group of Yanktons of about 30 to 40 lodges was camped on the west bank of the Missouri. This group was within the Sioux-Fort Laramie area.

Redfield also remarked in his report that the Sioux were still wandering tribes except, perhaps, for the Yanktons whom he said were partially so.

Sometime prior to August 26, 1857, Redfield passed a war party of some 25 Sans Arcs who had admitted taking some horses from Fort William, which was north of the area.

65. **Report of Superintendent Cumming, 1857.** In a report written on August 20, 1857, prior to his being replaced by Superintendent John Haverty, Superintendent Alfred Cumming disclosed that the Yanktons

claimed all the country lying between the Big Sioux River and a point upon the Missouri River opposite to Fort Pierre (east of the area). Cumming then suggested that a treaty be negotiated with the Yanktons for the purchase of this territory. [*510/511*]

66. **Report of Agent Redfield, 1857.** In Agent A. H. Redfield's November 9, 1857, report to Superintendent John Haverty, he mentioned that on September 19, he reached Fort Clark (north of the area) and was astonished to find 600 lodges of Sioux comprised mostly of Blackfeet, Hunkpapas, Sans Arcs, and Minneconjous with some Yanktonais and Yanktons. Redfield believed this large number had gathered to plan winter war operations against the Assiniboines and Crows. On September 29, he found 50 lodges of Yankton at Fort Pierre, and on October 5 at Fort Randall he found another 40 lodges of Yanktons. Further downstream was the Yankton village of The Man Struck by the Rees.

67. **Observations of Lieutenant Warren, 1857.** In the year 1857 Lieutenant G. K. Warren accompanied another military expedition to the region of the Upper Missouri River. The eastern portion of the area covered by the expedition was outside of the Sioux-Fort Laramie area. In September 1857 Warren encountered a 40 lodge camp of Minneconjous in the Black Hills (within the area). Brules were later sighted on the portion of the Niobrara River lying within the area. Lieutenant Warren, in describing the various Indian bands and their country, repeated much of what he reported in his 1856 account. However, he specified that the latest report included additions. Thus, there were differences.

The Yanktons were said to be found at the mouth of the Big Sioux River and between it and the Missouri and

as high up as Fort Lookout and on the opposite bank of the Missouri River (higher up than in the 1856 report).

The Tetons were said to live on the western side of the Missouri and extend west to the dividing ridge between the Little Missouri River and the Powder River, and then south on a line near the 106th meridian. [*511/512*]

The Teton bands were also broken down and described by location.

The Hunkpapas, Blackfeet and Sans Arcs were said to roam from the Cheyenne River up to the Yellowstone River and west to the Black Hills.

The Minneconjous were reported to principally roam from the Black Hills south to the Platte River (expanded southward since the 1856 report).

The Brules were found to live on the Niobrara and White Rivers and range from the Platte River to the Cheyenne River.

The Oglalas were said to be generally found on or near the Platte River near Fort Laramie (not necessarily between the forks of the Platte as his 1856 account reports).

The Two Kettle Band was said to be scattered among other bands, but some of them were found in the neighborhood of Fort Pierre (Fort Pierre location had not been indicated in the 1856 report).

68. **Sightings by Agent Vaughan, 1858.** In late May or early June 1858, Agent Alfred Vaughan reported a war party of Minneconjous passing down the Missouri River between Fort Union and Fort Berthold. This sighting was north of the Sioux-Fort Laramie area.

69. **Journal of Henry Boller, 1858.** Henry Boller who spent eight years in the West maintained a journal during

those years. In the summer of 1858, he met some Gros Ventres Indians who reported Hunkpapas and Blackfeet Sioux camped on the headwaters of the Knife River, north of the Sioux-Fort Laramie area.

Findings of Facts: Maps

Besides the various reports and observations noted, several persons traveling through the area or living in the area during the 1838 to 1858 period prepared maps which often designated the general locations of the [*512/513*] Sioux sub-tribes or bands. Though not as specific or exact as verbal descriptions, these maps do present evidence of where their authors believed certain Indians were located.

70. **Fur Trade Map, 1807-1843.** In one map covering the fur trade period between 1807 and 1843, the term "Sioux Nation" was placed on an area encompassing both sides of the Missouri River.

71. **Map Based on Information Gathered by Nicollet and Fremont, late 1830's.** In an 1843 map, compiled from information gathered from the surveys of J. N. Nicollet and J. C. Fremont during the late 1830's, the term "Yankton country" was placed on the east side of the Missouri River in the Plateau du Coteau region. "Teton country" was placed on the west side of the Missouri within the Sioux-Fort Laramie lands. The map did not include the northwest, west, and southwest portions of the Sioux-Fort Laramie area.

72. **Map Based Upon Fremont's Journal, 1846.** An 1846 map based upon the journal of Fremont, and the notes and sketches of his assistant, was entitled the "Road From Missouri To Oregon". "War Ground of the Snake and Sioux Indians" was placed over areas

outside the Sioux-Fort Laramie lands but adjacent to the southwest area. The term "Sioux Indians" was situated on the area south of the North Fork of the Platte River. This was outside of the Sioux-Fort Laramie lands.

73. **Map by Rufus Sage, 1846.** Rufus Sage drafted a map in 1846 of the territory westward from the Missouri. "Teton" was placed in an area within the Sioux-Fort Laramie lands. The term "Sioux" could be found in an area between the North Fork of the Platte River and Lodgepole Creek—outside of the area. There was no placement of "Yankton" on the map. [*513/514*]

74. **Map Prepared by J. Goldsborough Bruff.** J. Goldsborough Bruff prepared a map depicting emigrant trail routes on the road to California as they existed in 1849. Between the North and South Forks of the Platte River the word "Sioux" was affixed.

75. **Map by the Bureau of the Corps of Topographical Engineers, Circa 1850.** One map prepared around 1850 by the Bureau of the Corps of Topographical Engineers covered an area from the Mississippi River to the Pacific Ocean. The term "Sioux" was found between the forks of the Platte River. "Yanktons" was placed east of the Missouri River. No other use of either term was found on the map although "Dakotahs" was placed on the east side of the Missouri River. There were no designations of any Indians within the Sioux-Fort Laramie area, this area being a virtual blank spot.

76. **Map of Platte River Area, Circa 1850.** In another map compiled around 1850 "Sioux" was placed in an area between the North Fork of the Platte River and Lodgepole Creek—outside of the area. "Yanktons" was placed east and north of the Missouri River, also outside of the area. No other designations were found.

77. **Map by Father DeSmet, 1851.** In the 1851 map presented to D. D. Mitchell by Father Pierre-Jean DeSmet, the term "Sioux or Dakotah Territory" was located over an area generally corresponding to the Sioux-Fort Laramie area.

78. **Map of Platte River Area, 1854.** Inscribed on an 1854 map was a note by Agent Vaughan asserting his examination of the map and finding it correct. "Sioux Indians" was placed in an area between the North Fork of the Platte River and Lodgepole Creek. Most of the Sioux-Fort Laramie area and areas east of the Missouri were excluded from this map. [*514/515*]

79. **Map of J. H. Coulton, 1855.** In an 1855 map of Nebraska and Kansas compiled by J. H. Coulton, "Sioux" was affixed onto an area west of the Missouri River and within the Sioux-Fort Laramie area, and also placed between the forks of the Platte River which was outside of the area. There was no designation of "Yanktons". Both Nebraska and Kansas are west of the Missouri River. No lands east of the Missouri River were included.

80. **Map by Lieutenant Warren, 1855.** Lieutenant G. K. Warren's 1855 map compilation contained the geographic location of the Teton bands. All bands except the Oglalas were placed within the Sioux-Fort Laramie lands. The Oglalas were placed between the North Fork of the Platte River and Lodgepole Creek. The Yanktons were placed on the east side of the Missouri River wholly outside of the Sioux-Fort Laramie lands.

81. **Map by Lieutenant Warren, 1857-1858.** In a map compiled in 1857-58, based upon both of the expeditions he accompanied, Lieutenant Warren again affixed the various Teton bands and the Yanktons in

areas where his observations and reliable information found them to be. Most of the Teton bands were placed in the Sioux-Fort Laramie area. The Oglalas, as in his previous map, were placed between the North Fork of the Platte River and Lodgepole Creek. A small portion of the area designated as the location of the Hunkpapas and Blackfeet Sioux was also outside of the area. The Yanktons were placed completely on the east side of the Missouri River, outside of the area.

Findings of Fact: Expert Witnesses

82. **Docket 74 Plaintiffs.** Dr. Helen Tanner, an ethnohistorian and historical cartographer, testified as an expert witness for the Docket 74 plaintiffs. Dr. Tanner prepared a written report which was admitted into [*515/516*] evidence. Dr. Tanner testified that from 1820 to 1855, the bulk of the Teton Sioux used and occupied the Sioux-Fort Laramie lands continuously throughout the year, and that every significant Teton group could be found inside that tract at some time during the year. As basic conclusions, the Docket 74 witness expressed her expert opinion that: (a) the area of limited Yankton use amounted to approximately 4-5% of the entire Sioux-Fort Laramie lands; (b) Yankton use occurred jointly with use by the Brule and Two Kettle bands of Teton Sioux, so that the proportionate Yankton interest did not exceed 2½% of the total tract; and (c) the Yankton group which had shared use of the corner area became absorbed into the Brule band and is part of the Lower Brule plaintiff in Docket 74, not part of the Yankton plaintiff in Docket 332-C.

83. **Docket 332-C Plaintiffs.** Dr. Fred Nicklason, an assistant professor of history at the University of

Maryland, and Dr. John L. Champe, Professor of Anthropology, Emeritus, at the University of Nebraska, testified as expert witnesses for the Docket 332-C plaintiffs. Drs. Nicklason and Champe co-authored a report which was admitted into evidence. Dr. Nicklason and Dr. Champe concluded, upon the basis of their research, that (a) the evidence established that the Tetons and Yanktons used the Sioux-Fort Laramie lands for their subsistence for the better part of any given year; (b) the evidence did not indicate with any certainty how many members of the two sub-tribes used lands inside or outside of the Sioux-Fort Laramie lands; and (c) they could not quantify the actual use and occupancy by both sub-tribes of the Sioux-Fort Laramie lands except by comparing their total [*516/517*] population. It was their opinion that to do so would require a speculation that the evidence would not support.

/s/ Jerome K. Kuykendall, Chairman

/s/ John T. Vance, Commissioner

/s/ Richard W. Yarborough, Commissioner

/s/ Margaret H. Pierce, Commissioner

/s/ Brantley Blue, Commissioner

APPENDIX D

205 Ct. Cl. 148

500 F. 2d 458

THE SIOUX TRIBE, ET AL. v. THE UNITED STATES

Appeal No. 13-72

Ind. Cl. Comm. Docket Nos. 74 and 332-C;
Consolidated Docket Nos. 74 and 332-C

Before COWEN, *Chief Judge*, DAVIS and SKELTON, *Judges*.

COWEN, *Chief Judge*, delivered the opinion of the court:

* * *

165 B. *Apportionment of the Respective Interests of the Yankton and Teton Divisions of the Sioux in the Fort Laramie Land.* In considering the proportionate share of the Fort Laramie land to be divided between the Yankton and Teton Sioux, it is necessary to evaluate the basis by which the Yanktons and the Tetons derive their interest in this territory. The question here is whether the 1851 Treaty recognized title in both the Yankton and Teton Sioux, and if so, what is the proper basis for allocating the interests between the two parties. The Docket 74 Sioux maintain that the 1851 Treaty merely confirmed ownership of the land only in the Indians actually using the land and that the actual use and occupancy test is the correct basis for determining Teton-Yankton recognized title in the Fort Laramie land. Secondly, the Docket 74 Sioux argue that, if population is the proper method for determining the relative interests of the Sioux parties, the Commission should have considered only the members of the Teton and Yankton Sioux actually using the Fort Laramie land. The Government, as cross-appellant, contends that the proper way of dividing up the Sioux recog-

nized title is by a determination of which portion of the land each Sioux party held under aboriginal title, because this method would avoid the possibility of double liability by the Government (previously discussed).

As we discussed in part A above, the term "Sioux or Dahcotah Nation" in the 1851 Treaty included only those divisions of the Sioux located south and west of the Missouri River. Both Teton and Yankton Sioux chiefs took part in negotiating and executing the 1851 Treaty. The homelands of the Teton Sioux are in this area west of the Missouri River. Moreover, the Commission found that the Yanktons "occupied, to some extent, lands south or west of the Missouri
166 River" (24 Ind. Cl. Comm. at 154), and there is substantial evidence in the record to support this finding.[10]

In drafting the 1851 Treaty, the United States sought to deal with the Indians in each area who were in sufficient strength to pose a problem to intertribal peace and the safety of travelers crossing the land. It is not necessary to examine that presence to determine whether each of the parties held exclusive use and occupancy for a long period of time, as the Government contends. Article 5 of the Treaty was intended to recognize title to the land in the tribes actually using it without regard to whether or not they then had aboriginal title thereto. Recognized title is based on a grant from Congress, and, as a rule, is not dependent upon the existence of aboriginal title in the recipients.

However, our rejection of the need to establish aboriginal title does not preclude any inquiry into the extent to which the Tetons and the Yanktons used the land. Since Congress intended to recognize title in those Indians actually occupying or using the land, it is desirable, if possible, to determine

[10] In *Yankton Sioux* v. *United States*, 97 Ct. Cl. 56, 61 (1942), the court noted:

"Both before and after the Treaty of 1858 members of plaintiff [Yankton] band *hunted and roamed in the Sioux lands, as recognized by the treaty of 1851.*" (Emphasis added.)

the percentage of the total population of each of the claimants who used and occupied it.

In refusing to determine the treaty rights between the Yankton and the Teton Sioux on the basis of which party may have held aboriginal Indian title, we are in accord with our prior decisions involving the Fort Laramie Treaty. While the court spoke of "title by right of occupancy" in *Indians of the Fort Berthold Reservation* v. *United States*, 71 Ct. Cl. 308, 332 (1930), and this opinion was quoted in *Crow Tribe of Indians* v. *United States*, 151 Ct. Cl. 281, 292–93, 284 F. 2d 361, 368 (1960), *cert. denied*, 366 U.S. 924 (1961), the court was not establishing aboriginal Indian title, as that term is now defined, as the basis for evaluating which interests were recognized by the 1851 Treaty. Moreover, in dealing with the Assiniboine portion of the Fort Laramie land, the court found it unnecessary to determine the aboriginal Indian title to the land because "the lands were *expressly*
167 *granted* to plaintiff tribe by the treaty * * *." *Assiniboine Indian Tribe* v. *United States*, 77 Ct. Cl. 347, 370–71 (1933), *cert. denied*, 292 U.S. 606 (1934) (emphasis added). The Fort Laramie Treaty was clearly a treaty of recognition. *Crow Tribe of Indians* v. *United States*, 151 Ct. Cl. at 285–97, 284 F. 2d at 363–71. We think that the best method for determining the respective interests of the Tetons and the Yanktons in the Fort Laramie land is by assigning the interests on the basis of the number of Tetons and Yanktons who actually used and occupied the land.

The formula for assigning the interests on a total population basis used in *Blackfeet & Gros Venetres Tribe of Indians* v. *United States*, 18 Ind. Cl. Comm. 289, 321 (1967), may not be appropriate in this instance. The *Blackfeet* formula is based on the principle that, where title to a particular area is recognized in more than one tribe, each member of the tribe receives an equal right to use the land; consequently, each tribe takes an interest in the land proportionate to its total population. *See* 27 Ind. Cl. Comm. at 54. This method results in an approximation of the relative use and occupancy

of the territory in question. It is especially convenient where there is difficulty in proving actual use of the land. In this instance, however, comparing the total population of the two divisions of the Sioux treats the Yanktons as if they all were using the Fort Laramie land, when, in fact, only a portion of the Yankton Sioux may have actually used this territory.

In a concurring opinion in a motion for rehearing before the Commission, Commissioner Yarborough stated that:

> This Treaty was not a grant of new lands, but a recognition by the United States of a pre-existing use and occupancy by the tribes. Whatever the element of granting in it (as opposed to acknowledgment), it was to tribes as their occupancy interests would appear, not per capita or by a named fraction to each tribe. The relative use and occupancy of the area by each tribe depends on their subsistence patterns, [footnote omitted] which here depends on their numbers using the land in question. For this equation to be accurate, all the land used by all the Indians in question must be used in the calculation, as the Docket 74 plaintiffs suggest. The language of the *Blackfeet* case, *supra*, is correct in showing the dependence of population figure calculations on the underlying
168 facts of use and occupancy * * *. 27 Ind. Cl. Comm. at 56–57.[11]

We agree that the Sioux parties should take a proportionate interest in the Fort Laramie land according to their respective occupancy interests. The comparison of the total population of the two parties (wherever situated) at the time of the 1851 Treaty does not take into account the members of each division actually using the land. In a case decided subsequent to the decisions under review, the Commission found that evidence of actual use and occupancy could be considered in dividing recognized title areas, *James Strong* v. *United*

[11] Commissioner Yarborough states that he did not dissent from the denial of rehearing because "it has not been shown that evidence exists that would allow the Commission to make any reasonably accurate determination of actual use and occupancy . . . ." 27 Ind. Cl. Comm. at 57.

States, 30 Ind. Cl. Comm. 337, 345 *et seq.* (1973), and in another case, the Commission stated that evidence as to the use of the recognized title area by the respective tribes may be weighed as an alternative to comparing the total population figures. *Kiowa, Comanche & Apache Tribes of Indians* v. *United States*, 26 Ind. Cl. Comm. 101, 120 (1971), *rev'd on other grounds*, 202 Ct. Cl. 29, 479 F. 2d 1369 (1973), *cert. denied*, 416 U.S. 936 (1974). Because the ultimate question in this case on apportionment of the interests is the degree to which the two divisions of the Sioux used and occupied the Fort Laramie land, all relevant material should be taken into consideration. Only if there is insufficient evidence to determine the population of the two divisions actually using the Fort Laramie land, should the Commission resort to a comparison of the total population of the two parties.

The Docket 74 Sioux argue, however, that, in no case, should the Commission's previous determination on the basis of total population be allowed to stand because it is based on unreliable evidence. The Docket 74 Sioux primarily contend here that the Commission erroneously based the calculation on the number of lodges without sufficient evidence of the number of Indians per lodge and that the Commission should have based its allocation on the so-called "headcount" in 1862 of the Sioux in the Missouri area. In making its decision, the
169 Commission evaluated several population estimates, rejecting some and relying on others. The Commission explained that it based its determination of the respective populations on three estimates "chosen because they were all made by government officials as part of their official duties, included all the known Sioux rather than merely those present for a head count, and were made close enough in time to the effective date of the treaty to make them reliable." 24 Ind. Cl. Comm. at 159. In determining the relative populations of the two divisions, it is reasonable to rely on the respective number of lodges. Although Harney estimated all lodges to contain

three Indians while Warren and Vaughn estimated all lodges to contain eight Indians, this fact will not disturb the percentage figures for evaluating the comparative population for each evaluator.[12] As long as the Yankton lodges and the Teton lodges, on the average, are estimated to contain the same number of Indians the relative population of the two parties will not be disturbed. We recognize that the discrepancy in the estimates of the number of Indians per lodge indicates that these reports may be in error in the number of lodges, but the Docket 74 Sioux do not have a more reliable means for determining comparative population.

The Docket 74 Sioux have not shown that the 1862 population figures provide a more accurate estimate of the comparative populations at the time of the treaty. The Commission rejected the population estimates published in the 1862 Annual Report of the Commissioner on Indian Affairs because they give a "distorted picture of the total Sioux population." 24 Ind. Cl. Comm. at 159.[13] The Commission also noted
170 that the 1862 estimates were made a full 9 years after the effective date of the treaty. We recognize the difficulty in estimating the populations of the various Sioux divisions. *Cf. Sioux Tribe of Indians* v. *United States*, 84 Ct. Cl. 16, 29–30 (1936), *cert. denied*, 302 U.S. 740 (1937). While the Docket 74 Sioux have discovered a discrepancy in the estimates used by the Commission, the Docket 74 Sioux have not

[12] On September 20, 1853, Agent Alfred D. Vaughn of the Upper Missouri Agency reported his estimates of the Sioux population. 24 Ind. Cl. Comm. at 173. Brigadier General W. S. Harney led a military expedition against the Sioux in 1855. *Id.* at 172–74. Lieutenant G. K. Warren gave his population estimates in an 1856 report of his exploration. *Id.*

[13] The Commission stated:

"We rejected the population estimates published in the 1862 Annual Report of the Commissioner of Indian Affairs because it is apparent that the Yankton population was the result of an exact head count, while the figures from the Upper Platte and Upper Missouri agencies were estimates. It is likely that the agents for the Upper Platte and Upper Missouri included all of the Sioux known by them to be in their agencies. On the other hand, it is doubtful that the Yankton agent included those Yankton who were off the reservation hunting at the time of the census. These population figures, therefore, give a distorted picture of the total Sioux population • • •." 24 Ind. Cl. Comm. at 158–59.

shown the Commission's figures are unsupported by substantial evidence or that the method for determining the comparative population is more unreliable than the method they have suggested.[14]

We remand this portion of the case to the Indian Claims Commission to determine whether there is sufficient evidence of actual use to apportion the land on the basis of the comparative population of the Teton and Yankton divisions of the Sioux actually using the Fort Laramie land. If there is sufficient evidence, the apportionment should be made on that basis. On the other hand, if the parties are unable, after being given a reasonable opportunity to do so, to produce sufficient evidence to enable the Commission to apportion the interests in the land on that basis, the apportionment previously made by the Commission in its order of December 2, 1970, will be acceptable.

[14] We need not reach the questions raised in the alternative concerning the tenancy in common theory.

APPENDIX E

24 Ind. Cl. Comm. 147

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 74
Docket No. 332-C

[Decided: December 2, 1970]

THE SIOUX NATION, *ET AL.*,
THE YANKTON SIOUX TRIBE OF INDIANS,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
Defendant.

---

* * *

OPINION OF THE COMMISSION

Commissioner Vance delivered the opinion of the Commission.

* * * [*147/157*]

RESPECTIVE INTEREST IN THE SIOUX LARAMIE LAND

Having decided which bands constituted the "Sioux or Dahcotah Nation" in which title was recognized by the Treaty of Fort Laramie, the Commission will proceed to determine the respective interests of these bands in

the Sioux-Laramie land. Both plaintiffs agree, and the Commission so holds, that each Sioux party to the Treaty of Fort Laramie held an undivided interest in the Sioux-Laramie land. The plaintiffs each suggest alternative methods of fixing the extent of that interest: (1) a tenancy in common formula in which the Sioux bands would hold equal undivided interests; and (2) a population formula in which each tribe would hold an interest proportionate to its population. In rejecting the tenancy in common formula we adopt our language in *Blackfeet and Gros Ventre Tribes of Indians v. United States,* 18 Ind. Cl. Comm. 289 (1967):

> To apply such a rule to Indian lands would lead to an unjust result in most cases. Indian rights in land are tribal in nature and not individual. If [*157/158*] we tried to equate tribal rights with individual rights and thereby create an equal interest in an area among the basic fact of Indian use and occupancy. We would be creating a common law concept of title in an area where such concept had never grown by custom or usage. The smallest tribe would be entitled to as much as the largest one. To do this would be contrary to reason since a subsistence use of land necessarily implies a use in proportion to numbers. Where there is no evidence of intention to the contrary and no language stating what interest shall be taken, we think the proper and just manner of dividing tribal interests in a given area is by population as of the date of cession, or an average population near that date, whichever, is more reasonable under the particular circumstances. *Id.* at 321.

In this instance, we find that the most reasonable manner of dividing tribal interests is by population averages near the effective date of the Treaty of Fort Laramie. Accordingly, we hold that the Yankton Sioux

held an undivided 17% share of the Sioux-Laramie land, and that the Teton Sioux held an undivided 83% share in that land. (Finding No. 35). * * *

APPENDIX F

IN THE
UNITED STATES COURT OF CLAIMS

App. No. 4-78
App. No. 6-78

THE SIOUX TRIBE, *et al.*
THE YANKTON SIOUX TRIBE

v.

THE UNITED STATES

Before FRIEDMAN, *Chief Judge,* KUNZIG and BENNETT, *Judges.*

ORDER

This case comes before the court on motion of the Yankton Sioux Tribe, appellant in Appeal No. 6-78, filed February 25, 1980, for rehearing *en banc* pursuant to Rules 7(d) and 151(b), with reference to the opinion entered herein on February 20, 1980, affirming the decision of the Indian Claims Commission as to App. No. 6-78. Upon consideration thereof, without oral argument, by the six active Judges of the court (Judge Kashiwa taking no part therein) as to the suggestion for rehearing *en banc* under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that the motion of the Yankton Sioux Tribe, filed February 25, 1980, for rehearing be and the same is denied.

BY THE COURT

/s/ Daniel M. Friedman
Chief Judge

March 28, 1980

APPENDIX G

EXTRACT FROM INDIAN CLAIMS COMMISSION ACT

Section 20 (25 U.S.C. § 70s)

REVIEW BY COURT OF CLAIMS

* * *

(b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. In similar manner and with like effect either party may appeal to the Court of Claims from any interlocutory determination by the Commission establishing the liability of the United States notwithstanding such determination is not for any reason whatever final as to the amount of recovery; and any such interlocutory appeal shall be taken on or before January 1, 1961, or three months from such interlocutory determination, whichever is later: *Provided,* That the failure of either party to appeal from any such interlocutory determination shall not constitute a waiver of its right to challenge such interlocutory determination in any appeal from any final determination subsequently made in the case. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they

shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

Supreme Court, U. S.
FILED
APR 29 1980
MICHAEL RODAK, JR., CLERK

No. 79-1569

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THE YANKTON SIOUX TRIBE,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF OF SIOUX NATION IN OPPOSITION TO PETITION

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OCTOBER TERM, 1979

No. 79-1569

THE YANKTON SIOUX TRIBE,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF OF SIOUX NATION IN OPPOSITION TO PETITION

This case involves an allocation of ownership interests between the Teton Sioux and the Yankton Sioux in certain lands located west and south of the Missouri River, which were recognized by the United States as belonging to the "Sioux or Dahcotah Nation" under the Treaty of September 17, 1851 (11 Stat. 749), at Fort Laramie. Based upon findings of fact concerning the population of the various Sioux bands in 1851 and their relative use of the Fort Laramie tract, the Indian Claims Commission determined that the Tetons possessed an undivided 93% ownership interest therein and that the Yanktons, whose homeland concededly lay east of the Missouri River, possessed a 7% ownership interest. (Pet. App. 6b-7b.) The Court of Claims affirmed. (Pet. App. 12a-15a).

Petitioner does not here challenge the general principles of law established by the court below and applied by the Commission in deciding how to apportion the Sioux Fort Laramie lands. Petitioner challenges only the Court of Claims' holding that the Commission's findings of fact in this case are supported by substantial evidence. The question presented, therefore, has no precedential value or other significance, and clearly is unworthy of this Court's review.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 79-1569

In the Supreme Court of the United States

OCTOBER TERM, 1979

THE YANKTON SIOUX TRIBE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
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In the Supreme Court of the United States

OCTOBER TERM, 1979

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THE YANKTON SIOUX TRIBE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

STATEMENT

The only question presented to this Court is whether the Court of Claims correctly affirmed the final decision of the Indian Claims Commission determining the relative interest of two groups of Sioux Indians — the Tetons and the Yanktons — in some 60 million acres recognized as Sioux territory by the first Treaty of Fort Laramie in 1851. The issue arises because, in 1858, the Yankton Sioux ceded their interest in these lands to the United States for what has been determined to be an inadequate

consideration and the amount of the award to the Yankton depends upon the extent of that interest.[1]

1. Initially, the Indian Claims Commission determined that the interest of each of the Sioux groups in all of the ceded lands should be determined on the basis of the total population of each group, and, applying that rule, it concluded that the Yanktons were entitled to a 17% share (Pet. App. 2e-3e). Both the United States and the Teton Sioux challenged this result in the Court of Claims. We argued for a geographical allocation of interests, which the court rejected (see Pet. App. 1d-2d). Although its opinion perhaps left the door ajar, the court seemed to require the Commission to assume that both groups of Sioux enjoyed some interest in all the lands recognized as

---

[1]In 1978, the Indian Claims Commission valued the land in question, as of 1859 (when the 1858 treaty was ratified), at some $32.4 million and fixed the offsets allowable against the Yankton Sioux. See 43 Ind. Cl. Comm. 1, 72. Those determinations are now final, and the resulting award to the Yankton depends only on their proportional interest in these lands. Under the decision below, the award to the Yankton Sioux in respect of the subject lands would be $2,269,008.50; if, as the Commission originally found, that group held a 17% interest in the lands, the award would be increased by some $3.24 million.

The outcome of the present case will also affect the ultimate award to the Teton Sioux in respect of their cession to the United States of their interest in a large portion of the same lands by the second Treaty of Fort Laramie in 1868. The lands ceded by that 1868 treaty have been valued (as of that date) at $45,685,000 (Pet. App. 2a). After consideration of claimed "payments on the claim" and other offsets (which the Court of Claims, in this respect reversing the Commission, required to be determined, Pet. App. 3a-13a), the net award to the Teton Sioux will depend upon whether their retained interest in these lands was 83% (as the Commission originally found) or 93% (as the judgment below held).

belonging to that Nation by the 1851 Fort Laramie Treaty — regardless whether each group used all the lands — and that their respective interests must be determined on that basis (Pet. App. 2d-5d, 7d). This, at all events, is how the Commission understood the mandate (Pet. App. 3a-4a, 21a). However, the court accepted the Tetons' contention that the correct basis for assessing the interest of each group was not *total* population, but such number of Teton and Yankton as actually used the lands (see Pet. App. 1d-5d). Accordingly, the Commission was directed to determine, if possible, "the comparative population of the Teton and Yankton divisions of the Sioux actually using the Fort Laramie land" (Pet. App. 7d). If sufficient evidence was not available, the Court indicated that it would accept the Commission's previous allocation on the basis of total populations (*ibid.*).

Although the United States took no active part in the proceedings on remand, the Commission received voluminous evidence from the Sioux parties and made detailed findings (Pet. App. 23c-65c). However, after elaborating a number of reasons for finding the evidence ambiguous (Pet. App. 15c-20c), the Commission concluded: "Clearly, from the evidence we cannot determine whether all or simply a portion of the Yanktons or Tetons were involved in the use and occupancy activities [within the Fort Laramie treaty lands]" (Pet. App. 21c; see, also, Pet. App. 20c, 22c). The Commission therefore reverted to its previous apportionment of interest on the basis of total population (Pet. App. 22c).

2. The Tetons thereupon moved for rehearing and it was granted (Pet. App. 1b-2b). Asserting that it had initially misconstrued the remand order, the Commission now concluded that its earlier findings were "sufficient * * * to determine the approximate percentage of each

Sioux group that was using the Sioux-Fort Laramie lands" (Pet. App. 5b). Reciting indications as to how much time each Sioux band spent in the relevant area (Pet. App. 5b-6b), the Commission determined that "approximately * * * 25% of the Yanktons used and occupied the Sioux -Fort Laramie Lands," whereas larger portions of the various Teton bands did so (Pet. App. 6b). The result was a holding that the Yanktons enjoyed only a 7% interest in the lands (Pet. App. 7b).

3. The Yanktons appealed. Although characterizing as "unconvincing" "[t]he stated basis upon which the Commission granted rehearing" (Pet. App. 14a), the Court of Claims found no abuse of discretion, and concluded that "substantial evidence supports the Commission determination that the Yankton Sioux had a 7% interest in the land" (Pet. App. 14a-15a). Accordingly, the decision was affirmed (Pet. App. 15a). A motion for rehearing en banc was subsequently denied (Pet. App. 1f-2f).

DISCUSSION

The United States has no significant financial interest in the division of the aggregate award in this litigation between the contending Sioux groups.[2] Moreover, as

[2]Because, under the unchallenged findings of the Indian Claims Commission, the lands in question appreciated in value between 1858 (when the Yankton ceded their interest) and 1868 (when the Teton ceded their interest in a substantial portion of the same lands), the United States may be advantaged if the interest of the Yankton Sioux is determined to be greater. The net benefit of such a result, however, depends upon the extent to which offsets are ultimately allowed against the Teton claim. See note 1, *supra*. At all events, we do not now advance the relatively minor and conjectural consequence of the judgment below on the ultimate liability of the United States as a relevant factor in this Court's consideration of the present petition.

indicated, once the suggestion of a geographic allocation of interests was rejected, the government took no active part in this dispute. Nor have we reviewed all the evidence. In these circumstances, we are reluctant to express any views on the merits of the present controversy. Nevertheless, as a party to the case, we have deemed it our duty to examine the Commission's findings to assure ourselves that no patent injustice has been done, and we submit the following comments.

1. On the face of the decision of the Indian Claims Commission on rehearing and the opinion of the Court of Claims, no explanation is offered how a conclusion could be reached that any given percentage of the several Sioux bands used the relevant area. Petitioner's charge that "these were figures conjured from the air" (Pet. 6) is not without force, especially in light of the Commission's explicit and repeated finding that it could make no such determinations on the evidence. With respect to the Yanktons, the only arguably relevant statement in the Commission's last opinion is that they "spent most of their time east of the Missouri River [outside the subject area]," although "there was Yankton activity in the Sioux-Fort Laramie lands, particularly in that area close to the Missouri" (Pet. App. 6b). But that does not necessarily tell us *how many* members of the group used the area, however occasionally.

2. If the matter rested there, it might be difficult to support the result. But, in our view, there are, on the face of the findings and opinions now before the Court, sufficient indications that petitioners have not been unjustly treated.

First, as the Commission recited (Pet. App. 18c), "[i]t was conceded by both parties that the Yankton country was east of the Missouri River" — wholly outside the relevant area. Although they roamed and hunted elsewhere, the "home" of the Yankton Sioux, in contrast to most of the Teton bands, was beyond the territory which is the subject of this case (see, *e.g.*, Pet. App. 5c-6c, 7c, 10c, 13c-14c, 14c-15c, 17c, 18c, 19c, 25c, 26c, 29c, 34c, 37c, 41c, 41c-42c, 43c, 49c, 50c, 51c, 53c, 54c, 57c, 58c, 58c-59c, 61c, 62c, 63c, 64c). To be sure, the compensable interest of an Indian Tribe in land is not restricted to their "home base." But, in assessing the relative claims of the two groups in the same territory, it seems right to concede a greater interest to these who "live" on the land than to others who merely use it as a "range."

Second, because their "home" was outside the area, the Yankton spent relatively little time in the lands here in question. They were most often sighted outside the Fort Laramie lands. It appears that they entered the relevant area primarily to receive their provisions and supplies from the government (see Pet. App. 36c, 39c, 56c), or to trade (see Pet. App. 17c, 26c), or to hunt (see Pet. App. 7c, 29c). Indeed, the Commission was not sure whether the Yankton hunting activities were at all times within the treaty lands (see, *e.g.*, Pet. App. 7c n.2, 29c). But, even assuming that all the Yankton Sioux, with their families, joined in an annual or semi-annual pilgrimage west to obtain supplies or to hunt (see Pet. App. 7c, 29c, 36c), it may be appropriate to treat such occasional visits to the subject area as imparting a diminished interest only.

Third, it seems clear that the Yankton occupied, with any consistency, only a relatively small portion of the territory in question (see Pet. App. 10c, 20c). While the

Commission deemed this fact irrelevant under the remand order (Pet. App. 21c), it may well be that, in affirming the ultimate allocation of interests, the Court of Claims took this into account, and, in our view, it would have been entitled to do so.

Finally, the Commission noted that, before 1858, "the Yanktons had become less nomadic than in previous years, and were starting to lead a life based upon the cultivation of the soil, rather than a life dependent upon the chase" and that, accordingly, "their use of lands within the Sioux-Fort Laramie area was diminished" (Pet. App. 15c; see also Pet. App. 57c, 58c). Because the Commission was seeking to fix the interests of the two Sioux groups in the subject area as of *1851*, it gave no weight to this development. That may be correct. Yet, since the Treaty of 1851 did not purport to specify the relative interest of the several Sioux bands in the territory recognized as belonging to them all, it is not entirely clear that a claim arising from a cession of interest in *1858* should be unaffected by an intervening change of occupancy and use patterns. The finding that, to a significant degree, the Yankton Sioux had abandoned their former hunting grounds to other bands before they ceded their interest in those lands, is perhaps not wholly irrelevant in determining their proper share in the ultimate award.

3. Petitioners are entitled to say that none of these considerations were articulated by the Commission in reaching its ultimate conclusion; that the 7% interest in the treaty lands conceded to the Yankton Sioux was based solely on a determination not supported by the detailed findings — that only some [illegible]% of their total numbers in 1851 occupied or used any part of the

relevant area. Petitioners may add that the Court of Claims, in affirming, did not specify any different basis for its action, and that it earlier had directed the Commission to proceed as it did. In these circumstances, a remand might seem appropriate.

On the other hand, it is to be noted that the Court of Claims expressly affirmed only the result, not the Commission's reasoning. Indeed, one may doubt whether the Commission itself did not articulate its conclusion in the way it did because it felt bound by the Court's earlier direction. At all events, it appears that the detailed findings entered by the Commission would justify an award perhaps no more generous to petitioners — albeit on somewhat broader grounds. If that is so, this Court may deem it unnecessary to require further proceedings in this already very protracted litigation.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1980

DOJ-1980-04